No. 04-885

Title:	Central Virginia Community College, et al., Petitioners v. Bernard Katz, Liquidating Supervisor for Wallace's Bookstores, Inc.
Docketed:	December 30, 2004
Lower Ct:	United States Court of Appeals for the Sixth Circuit
Case Nos.:	(03-6054)
Decision Date:	August 4, 2004
Rehearing Denied:	September 30, 2004

Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Dec 28 2004	Petition for a writ of certiorari filed. (Response due January 31, 2005)
Jan 25 2005	Order extending time to file response to petition to and including March 2, 2005.
Mar 2 2005	Brief of respondent Bernard Katz, Liquidating Supervisor for Wallace in opposition filed.
Mar 2 2005	Brief amici curiae of Ohio and 48 Other States filed.
Mar 14 2005	Reply of petitioners Central Virginia Community College, et al. filed. (Distributed)
Mar 16 2005	DISTRIBUTED for Conference of April 1, 2005.
Apr 4 2005	Petition GRANTED.
Apr 18 2005	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including June 17, 2005.
Apr 26 2005	Extension of time within which to file the respondent's brief on the merits to and including August 22, 2005.
Jun 8 2005	Consent to the filing of amicus briefs in support of either party received from counsel for the petitioners.
Jun 8 2005	Consent to the filing of amicus briefs in support of either party received from counsel for the respondents.
Jun 17 2005	Brief amici curiae of American Association of State Colleges and Universities, et al. filed.
Jun 17 2005	Brief amici curiae of National Conference of State Legislatures, et al. filed.
Jun 17 2005	Brief of petitioners Central Virginia Community College, et al. filed.
Jun 17 2005	Joint appendix filed.
Jun 17 2005	Brief amici curiae of Ohio and 48 Other States filed.
Jul 20 2005	SET FOR ARGUMENT on October 31, 2005.
Aug 5 2005	CIRCULATED.
Aug 22 2005	Brief amici curiae of Susan Block-Lieb, et al. filed. (Distributed)

Aug 22 2005	Brief amicus curiae of Bruce H. Mann filed. (Distributed)
Aug 22 2005	Brief amicus curiae of National Association of Bankruptcy Trustees filed. (Distributed)
Aug 22 2005	Brief of respondent Bernard Katz, Liquidating Supervisor for Wallace filed. (Distributed)
Sep 22 2005	Record received from U.S.C.A. - 6th Circuit. (1 binder). Filings from U.S.D.C. and U.S. Bankruptcy Court for the Eastern Dist. of Kentucky have been electionically filed.
Sep 26 2005	Reply of petitioner Central Virginia Community College, et al. filed. (Distributed)
Oct 5 2005	Letter from counsel for the respondent received. Distributed.
Oct 31 2005	Argued. For petitioners: William E. Thro, Solicitor General, Richmond, Va. For respondent: Kim Martin Lewis, Cincinnati, Ohio.

Supreme Court, U.S.
FILED

No. 04-__04 885 DEC 28 2004

In The
Supreme Court of the United States

CENTRAL VIRGINIA COMMUNITY COLLEGE,
VIRGINIA MILITARY INSTITUTE,
NEW RIVER COMMUNITY COLLEGE, and
BLUE RIDGE COMMUNITY COLLEGE,

Petitioners,

v.

BERNARD KATZ, Liquidating Supervisor of the Bankrupt Estate of *In re Wallace's Bookstores, Inc.*, No. 01-50545 (Bkr. E.D. Ky.),

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

JERRY W. KILGORE
Attorney General of Virginia

WILLIAM E. THRO
State Solicitor General
Counsel of Record

MAUREEN RILEY MATSEN
Deputy State Solicitor General

900 East Main Street
Richmond, Virginia 23219
(804) 786-2436
(804) 786-1991 (facsimile)

Counsel for Petitioners

CARLA R. COLLINS
VALERIE L. MYERS
RONALD N. REGNERY
Associate State Solicitors General

December 29, 2004

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

May Congress use the Article I Bankruptcy Clause, U.S. Const. art. I, § 8, cl. 4, to abrogate the States' sovereign immunity?

PARTIES TO THE PROCEEDINGS

The Petitioners are four public institutions of higher education in Virginia – Central Virginia Community College, Virginia Military Institute, New River Community College, and Blue Ridge Community College.[1]

The Respondent is Bernard Katz, who is the Liquidating Supervisor of the bankrupt estate for *In re Wallace's Bookstores, Inc.*, No. 01-50545 (Bkr. E.D. Ky.). Katz commenced a bankruptcy adversary proceeding against each of the Petitioners.

[1] Like all public institutions of higher education in Virginia, the Petitioners are considered the Commonwealth of Virginia for purposes of sovereign immunity. *See Shepard v. Irving*, 204 F. Supp. 2d 902, 912 (E.D. Va. 2002); *University of Virginia v. Robertson (In re Robertson)*, 243 B.R. 657, 661 n.4 (W.D. Va. 2000) (bankruptcy appeal); *DeBauche v. Virginia Commonwealth Univ.*, 7 F. Supp. 2d 718, 722 (E.D. Va. 1998); *Thorpe v. Virginia State Univ.*, 6 F. Supp. 2d 507, 509 n.4 (E.D. Va. 1998).

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	iv
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	2
STATEMENT UNDER RULE 29.4(b)	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE	3
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	11
I. THE CIRCUITS ARE DIVIDED ON THE ISSUE OF WHETHER CONGRESS MAY USE THE ARTICLE I BANKRUPTCY CLAUSE TO ABROGATE SOVEREIGN IMMUNITY	12
A. The Five Circuits Holding that the Bankruptcy Clause May Not Be Used To Abrogate Sovereign Immunity	12
B. The One Circuit Holding that the Bankruptcy Clause May Be Used To Abrogate Sovereign Immunity	15
II. THE CONFLICT AMONG THE CIRCUITS HAS SERIOUS CONSEQUENCES FOR THE STATES	18
III. THIS PETITION PROVIDES AN EXCELLENT VEHICLE FOR RESOLVING THE CONFLICT AMONG THE CIRCUITS	19
CONCLUSION	21

TABLE OF AUTHORITIES

Page

CASES

Alden v. Maine,
527 U.S. 706 (1999) 4, 8

Board of Trustees of Univ. of Alabama v. Garrett,
531 U.S. 356 (2001) 7

DeBauche v. Virginia Commonwealth Univ.,
7 F. Supp. 2d 718 (E.D. Va. 1998) ii

Department of Transp. & Dev. v. PNL Asset Mgmt. Co. LLC (In re Fernandez),
123 F.3d 241 (5th Cir.),
amended by 130 F.3d 1138 (5th Cir. 1997) ..... *passim*

Federal Maritime Comm'n v. South Carolina State Ports Auth.,
535 U.S. 743 (2002) 4, 14, 15, 16

Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank,
527 U.S. 627 (1999) 8, 14, 15, 16

H.J. Wilson v. Comm'r of Revenue (In re Serv. Merch. Co.),
333 F.3d 666 (6th Cir. 2003),
cert. denied, 124 S. Ct. 2388 (2004) 20

Hoffman v. Connecticut Dep't of Income Maint.,
492 U.S. 96 (1989) 8, 12, 13

Hood v. Tennessee Student Assistance Corp. (In re Hood),
319 F.3d 755 (6th Cir. 2003) (*Hood I*) ..... *passim*

Katz v. Central Virginia Community College (In re Wallace's Bookstores),
106 Fed. Appx. 341 (6th Cir. 2004) (*per curiam*) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Kimel v. Florida Bd. of Regents,
528 U.S. 62 (2000) 7, 8

Matsushita Elec. Indus. Co. v. Epstein,
516 U.S. 367 (1996) 6

Mitchell v. Franchise Tax Bd. (In re Mitchell),
209 F.3d 1111 (9th Cir. 2000) ..... *passim*

Moltan Co. v. Eagle-Picher Indus.,
55 F.3d 1171 (6th Cir. 1995) 5

Nelson v. La Crosse County Dist. Attorney (In re Nelson),
301 F.3d 820 (7th Cir. 2002) ..... *passim*

New York v. United States,
505 U.S. 144 (1992) 3, 4

Pennsylvania v. Union Gas Co.,
491 U.S. 1 (1989) 8

Printz v. United States,
521 U.S. 898 (1997) 4

Sacred Heart Hosp. v. Department of Pub. Welfare (In re Sacred Heart Hosp.),
133 F.3d 237 (3d Cir. 1998) ..... *passim*

Schlossberg v. Comptroller of Treasury (In re Creative Goldsmiths of Washington, D.C.),
119 F.3d 1140 (4th Cir. 1997) ..... *passim*

Seminole Tribe v. Florida,
517 U.S. 44 (1996) 8, 12, 16

Shepard v. Irving,
204 F. Supp. 2d 902 (E.D. Va. 2002) ii

TABLE OF AUTHORITIES – Continued

Page

Tennessee Student Assistance Corp. v. Hood, 124 S. Ct. 1905 (2004) (*Hood II*) ..... *passim*

Thorpe v. Virginia State Univ., 6 F. Supp. 2d 507 (E.D. Va. 1998) ii

University of Virginia v. Robertson (In re Robertson), 243 B.R. 657 (W.D. Va. 2000) ii

Vanston Bondholders Protective Comm. v. Green, 329 U.S. 156 (1946) 13

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 8, cl. 4 ..... *passim*

U.S. Const. amend. X ..... *passim*

U.S. Const. amend. XI ..... *passim*

STATUTES

11 U.S.C. § 106(a) ..... *passim*

11 U.S.C. § 106(b) 6

11 U.S.C. § 502 10

11 U.S.C. § 547(b) 9

28 U.S.C. § 451 2

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2403(a) 2

TABLE OF AUTHORITIES – Continued

Page

COURT RULES

Fed. R. Bankr. P. 3002 10

Sup. Ct. R. 29.4(b) 2

FEDERALIST PAPERS

The Federalist No. 32 (Alexander Hamilton) 17

The Federalist No. 42 (James Madison) 13

The Federalist No. 81 (Alexander Hamilton) 17

OTHER AUTHORITIES

Petition for Certiorari, *Commissioner of Revenue v. H.J. Wilson Co., Inc.*, (Dec. 9, 2003) (No. 03-879) 20

Respondent's Brief in Opposition to the Petition for Certiorari, *Commissioner of Revenue v. H.J. Wilson Co., Inc.*, (Jan. 20, 2004) (No. 03-879) 20

PETITION FOR WRIT OF CERTIORARI

Central Virginia Community College, Virginia Military Institute, New River Community College, and Blue Ridge Community College (collectively, "the Virginia Institutions"), by and through their counsel, Virginia Attorney General Jerry W. Kilgore, respectfully petition this Court for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Sixth Circuit. The court of appeals, relying on its previous decision in *Hood v. Tennessee Student Assistance Corporation (In re Hood)*, 319 F.3d 755 (6th Cir. 2003) (*Hood I*), *aff'd on other grounds,* 124 S. Ct. 1905 (2004) (*Hood II*), held that Congress may use the Article I Bankruptcy Clause, U.S. Const. art. I, § 8, cl. 4, to abrogate the States' sovereign immunity. The court of appeals' decision is contrary to the decisions of five other Circuits and appears to conflict with the pronouncements of this Court. It also creates significant difficulty for the States. Certiorari should be granted.

OPINIONS BELOW

The panel decision of the court of appeals is unpublished but is reported as *Katz v. Central Virginia Community College (In re Wallace's Bookstores)*, 106 Fed. Appx. 341 (6th Cir. 2004) (*per curiam*). It is reprinted in the Appendix at 1. The decision of the U.S. District Court for the Eastern District of Kentucky is unpublished and unreported, but is reprinted in the Appendix at 3. The decisions of the U.S. Bankruptcy Court for the Eastern District of Kentucky also are unpublished and unreported, but are reprinted in the Appendix at 5 (Central Virginia Community College), 7

(Virginia Military Institute), 9 (New River Community College), and 11 (Blue Ridge Community College).[2] The decision of the Sixth Circuit denying rehearing *en banc* is unpublished and unreported. It is reprinted in the Appendix at 13.

JURISDICTION

The panel decision of the court of appeals was entered on August 4, 2004. The decision of the court of appeals denying the Virginia Institutions' petition for rehearing *en banc* was entered on September 30, 2004.[3] This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT UNDER RULE 29.4(b)

This proceeding questions the constitutionality of 11 U.S.C. § 106(a), which purports to abrogate the States' sovereign immunity for adversary proceedings in bankruptcy. Because neither the United States nor any agency, officer, or employee thereof is a party, the Virginia Institutions note that 28 U.S.C. § 2403(a) is applicable.

No court of the United States, as defined by 28 U.S.C. § 451 has, pursuant to 28 U.S.C. § 2403(a), certified to the

[2] In the bankruptcy court, there were four separate cases – one against each of the institutions. The four appeals were consolidated in the district court and taken as one appeal to the court of appeals.

[3] The court of appeals stayed its mandate pending this Court's resolution of this Petition.

Attorney General of the United States the fact that the constitutionality of 11 U.S.C. § 106(a) has been questioned.[4]

A copy of this Petition for Writ of Certiorari has been served on the Solicitor General of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

This petition involves the following constitutional and statutory provisions:

1. The Bankruptcy Clause of the United States Constitution, Art. I, § 8, cl. 4, states: "The Congress shall have Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."

2. The Tenth Amendment to the United States Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[5]

[4] On two separate occasions, the Virginia Institutions advised the court of appeals that they were challenging the constitutionality of a federal statute and that the Attorney General of the United States should be notified of the challenge. Apparently, the Attorney General was never notified.

[5] As this Court has observed,

> The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine, as in this case,

(Continued on following page)

3. The Eleventh Amendment to the United States Constitution provides: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State. . . ."[6]

4. The federal statute at issue in this petition, 11 U.S.C. § 106(a), provides:

> (a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:
>
> (1) Section . . . 505 . . . of this title.
>
> (2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.
>
> (3) The court may issue against a governmental unit an order, process, or judgment under such section or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery. . . .

---

whether an incident of state sovereignty is protected by a limitation on an Article I power.

New York v. United States, 505 U.S. 144, 156-57 (1992). Moreover, the Tenth Amendment is not the exclusive textual source of protection for principles of federalism. *See Printz v. United States*, 521 U.S. 898, 953 n.13 (1997).

[6] While the Eleventh Amendment confirms the existence of the States' sovereign immunity, it "does not define the scope of the States' sovereign immunity; it is but one particular exemplification of that immunity." *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 753 (2002). *See also Alden v. Maine*, 527 U.S. 706, 713 (1999) ("[S]overeign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment.").

STATEMENT OF THE CASE

1. In *Hood II*, this Court granted review "to decide whether Congress has the authority to abrogate state sovereign immunity under the Bankruptcy Clause." *Hood II*, 124 S. Ct. at 1915 (Thomas, J., joined by Scalia, J., dissenting). However, this Court ultimately decided *Hood II* on other grounds (*in rem* jurisdiction) and, thus, declined "to decide whether a bankruptcy court's exercise of personal jurisdiction over a State would be valid under the Eleventh Amendment." *Id.* at 1915 (Opinion of Court). Consequently, the issue that this Court desired to decide and that it needed to decide in order to resolve a deep and mature conflict among the Circuits went undecided.

This Petition presents an opportunity to resolve the exact same issue presented by *Hood II*. Indeed, in ruling against the Virginia Institutions' claim of sovereign immunity, the Sixth Circuit relied exclusively on its previous decision in *Hood I*.[7] *See App.* at 2.[8] More importantly, because this matter involves bankruptcy adversary proceedings seeking to recover alleged preferential transfers, there is no possibility that the case can be decided because of *in rem* jurisdiction. *See Hood II*, 120 S. Ct. at

---

[7] Because this Court, in deciding *Hood II*, never addressed the correctness of the Sixth Circuit's rationale in *Hood I*, the reasoning of *Hood I* remains binding precedent in the Sixth Circuit. *See Moltan Co. v. Eagle-Picher Indus., Inc.*, 55 F.3d 1171, 1176 (6th Cir. 1995) ("We cannot overturn the prior published opinion of another panel and are therefore bound by these previous decisions."). As a result, the three-judge panel of the lower court had no choice but to follow *Hood I* and summarily affirm.

[8] Because the sole basis for the lower court's ruling was its decision in *Hood I*, this Petition, as a practical matter, is a request to review the reasoning of *Hood I*. Given that this Court has already expressed a willingness to review *Hood I*, it should grant this Petition.

1914 ("The case before us is thus unlike an adversary proceeding by the bankruptcy trustee seeking to recover property in the hands of the State on the grounds that the transfer was a voidable preference."). Furthermore, while there is an argument that Virginia Military Institute waived its sovereign immunity,[9] there is no such argument with respect to the three community colleges.[10] Therefore, this Petition gives this Court an opportunity to decide the issue that it wished to decide, but could not decide, in *Hood II*.

[9] Regardless of whether Congress may use the Bankruptcy Clause to abrogate sovereign immunity, there is an argument that Virginia Military Institute's sovereign immunity was waived when one of its employees filed a proof of claim on its behalf. Resolution of the waiver question involves the following questions: (1) whether 11 U.S.C. § 106(b), which states that the filing of a proof of claim is deemed a waiver of sovereign immunity, is constitutional; (2) whether, as a matter of constitutional law, the filing of a proof of claim constitutes a waiver of sovereign immunity; and (3) assuming that filing a proof of claim does constitute waiver, whether the employee who filed the proof of claim had the authority to waive the institution's sovereign immunity. Because these issues were not addressed by the court below, this Court should decline to address them. *See Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 379 n.5 (1996) ("[W]e generally do not address arguments that were not the basis for the decision below."). Rather, if this Court grants review and ultimately determines that Congress cannot use the Bankruptcy Clause to abrogate sovereign immunity, it should remand the claims against Virginia Military Institute to the Sixth Circuit for resolution of the waiver issues.

[10] Central Virginia Community College, New River Community College, and Blue Ridge Community College did not file proofs of claim. Thus, there is no waiver argument with respect to these institutions. If certiorari is granted, resolution of the claims against these institutions will require this Court to determine the central issue – whether Congress can use the Bankruptcy Clause to abrogate sovereign immunity.

That issue – whether Congress may use the Article I Bankruptcy Clause to abrogate sovereign immunity – divides the Circuits. Five Circuits have held that the States' sovereign immunity may not be abrogated for adversary proceedings in bankruptcy. *See Nelson v. La Crosse County Dist. Attorney (In re Nelson)*, 301 F.3d 820, 832 (7th Cir. 2002); *Mitchell v. Franchise Tax Bd. (In re Mitchell)*, 209 F.3d 1111, 1121 (9th Cir. 2000); *Sacred Heart Hosp. v. Department of Pub. Welfare (In re Sacred Heart Hosp.)*, 133 F.3d 237, 243 (3d Cir. 1998); *Department of Transp. & Dev. v. PNL Asset Mgmt. Co. LLC (In re Fernandez)*, 123 F.3d 241, 243 (5th Cir.), *amended by* 130 F.3d 1138, 1139 (5th Cir. 1997); *Schlossberg v. Comptroller of Treasury (In re Creative Goldsmiths of Washington, D.C.)*, 119 F.3d 1140, 1145-46 (4th Cir. 1997) (all holding that sovereign immunity has not been abrogated for adversary proceedings in bankruptcy). In contrast, the Sixth Circuit, in *Hood I* and in this case, held that Congress could use the Bankruptcy Clause to abrogate sovereign immunity and the States were not immune from bankruptcy adversary proceedings. *See Hood I*, 319 F.3d at 764-68. *See also App.* at 2 (stating that *Hood I* was controlling).

Moreover, by holding that "the Bankruptcy Clause operates differently than Congress' other Article I powers," *Hood II*, 124 S. Ct. at 1920 (Thomas, J., joined by Scalia, J., dissenting), the Sixth Circuit directly contradicted this Court's previous statements that Congress' Article I powers could *never* be used to abrogate sovereign immunity. *See Board of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 364 (2001) ("Congress may not . . . base its abrogation of the States' Eleventh Amendment immunity upon the powers enumerated in Article I."); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 78 (2000) ("In *Seminole Tribe*, we held that Congress lacks power under

Article I to abrogate the States' sovereign immunity. 'Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.'"); *Id.* at 80 ("Congress' powers under Article I of the Constitution do not include the power to subject States to suit at the hands of private individuals."); *Alden*, 527 U.S. at 748 ("[I]t is settled doctrine that neither substantive federal law nor attempted congressional abrogation under Article I bars a State from raising a constitutional defense of sovereign immunity in federal court."); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 636 (1999) ("*Seminole Tribe* makes clear that Congress may not abrogate state sovereign immunity pursuant to its Article I powers."); *Seminole Tribe v. Florida*, 517 U.S. 44, 72-73 (1996) ("Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States."); *Id.* at 73 ("Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."). *See also Hood II*, 124 S. Ct. at 1920 (Thomas, J., joined by Scalia, J., dissenting) ("This Court has repeatedly stated that 'Congress may not . . . base its abrogation of the States' Eleventh Amendment immunity upon the powers enumerated in Article I.'"); *Hoffman v. Connecticut Dep't of Income Maint.*, 492 U.S. 96, 105 (1989) (O'Connor, J., concurring) ("Congress may not abrogate the States' Eleventh Amendment immunity by enacting a statute under the Bankruptcy Clause . . . "); *Id.* at 105 (Scalia, J., concurring) (stating his belief that Congress should not be able to use any of its Article I powers to abrogate sovereign immunity); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 42 (1989) (Scalia, J., joined by Rehnquist, C.J., O'Connor, & Kennedy, J.J., dissenting) ("[I]f the Article I commerce power enables abrogation of state sovereign immunity, so do all the other Article I powers. An interpretation of the original Constitution which permits Congress to eliminate sovereign immunity only if it wants to renders the doctrine a practical nullity and is therefore unreasonable.").

2. The factual and procedural background for this Petition is relatively straightforward. Wallace's Bookstores, Inc. operated college and university bookstores in a number of States. Each of the four Virginia Institutions did business with the company prior to it declaring bankruptcy. After commencement of the bankruptcy proceeding, the Respondent, Bernard Katz, who is the Liquidating Supervisor of the bankrupt estate, commenced adversary proceedings to recover alleged preferential transfers under 11 U.S.C. § 547(b), and to collect on accounts receivable that the debtor alleges are owed to it by the Virginia Institutions. The alleged preferential payments purportedly were made by the debtor pursuant to separate contracts with each of the Virginia Institutions.[11] The adversary complaints also allege that the Virginia Institutions, as unsecured creditors, should each be denied the

[11] Each contract states that Virginia law will control. Nevertheless, despite the fact that the contracts call for Virginia law, two of the adversary complaints also seek to recover alleged preferential transfers under a Kentucky preference statute. Virginia has no similar preference law.

right to any distribution from the bankruptcy estate on any proof of claim they might have filed.[12]

3. The Virginia Institutions moved to dismiss all of the adversary proceedings on sovereign immunity grounds. Had the litigation taken place in Virginia or in any other State in the Third, Fourth, Fifth, Seventh, or Ninth Circuits, the Virginia Institutions' motion to dismiss would have been granted. *See Nelson*, 301 F.3d at 832; *Mitchell*, 209 F.3d at 1121; *Sacred Heart Hosp.*, 133 F.3d at 243; *Fernandez*, 123 F.3d at 244; *Schlossberg*, 119 F.3d at 1145-46. However, because this litigation took place in Kentucky, which is part of the Sixth Circuit, the bankruptcy court was bound to follow *Hood I* and deny the motions. *App.* at 5-12.

4. The Virginia Institutions appealed to the district court which, also being bound by *Hood I*, held that sovereign immunity had been abrogated. *App.* at 4.[13]

5. The Virginia Institutions appealed to the court of appeals. The Sixth Circuit apparently delayed resolution of the appeal until after this Court decided *Hood II*. Once

[12] Only one institution, Virginia Military Institute, filed a proof of claim. It did so because it had no choice if it wished to recover more than $43,000 owed to it. The filing of a proof of claim by an unsecured creditor is required under Fed. R. Bankr. P. 3002 before the claim can be allowed under 11 U.S.C. § 502 and, therefore, before an unsecured creditor can receive any distribution from a bankruptcy estate in whole or partial satisfaction of that claim. Thus, if filing of a proof of claim is deemed a waiver of sovereign immunity, Virginia Military Institute faced the choice of waiving its sovereign immunity or surrendering its legal right to recover monies owed to it.

[13] Having concluded that sovereign immunity had been abrogated, the district court declined to address the issue of whether sovereign immunity had been waived for Virginia Military Institute. *App.* at 4.

this Court rendered its decision without resolving whether Congress could use the Bankruptcy Clause to abrogate sovereign immunity, *Hood II*, 124 S. Ct. at 1915, the court of appeals applied its decision in *Hood I* and affirmed. *App.* at 1-2. The court of appeals denied the Virginia Institutions' petition for rehearing *en banc*. *App.* at 13-14. This Petition follows.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to resolve a conflict among the Circuits on the issue of whether Congress may use the Article I Bankruptcy Clause to abrogate sovereign immunity. This is so for three reasons. First, the Circuits are divided on the issue. Five Circuits have held that the Bankruptcy Clause may not be used to abrogate sovereign immunity and one Circuit – the Sixth – has reached the opposite conclusion. Second, the Circuit conflict has serious consequences for the States. Depending upon where the adversary proceeding is filed, the States obtain immediate dismissal, are forced to expend resources litigating the issue of whether sovereign immunity has been abrogated, or have to litigate on the merits. Third, this Petition is an excellent vehicle for resolving the conflict among the Circuits. This matter cannot be resolved on the grounds of *in rem* jurisdiction or waiver of sovereign immunity.

I. THE CIRCUITS ARE DIVIDED ON THE ISSUE OF WHETHER CONGRESS MAY USE THE ARTICLE I BANKRUPTCY CLAUSE TO ABROGATE SOVEREIGN IMMUNITY.

A. The Five Circuits Holding that the Bankruptcy Clause May Not Be Used To Abrogate Sovereign Immunity

"I agree with Justice Scalia that Congress may not abrogate the States' Eleventh Amendment immunity by enacting a statute under the Bankruptcy Clause. . . ." *Hoffman,* 492 U.S. at 105 (O'Connor, J., concurring). *See also Id.* at 105 (Scalia, J., concurring) (Congress should not be able to use its Article I powers to abrogate sovereign immunity and emphasizing, "there is no basis for treating its powers under the Bankruptcy Clause any differently."). *Cf. Seminole Tribe*, 514 U.S. at 72 n.16 ("[I]t has not been widely thought that the federal antitrust, bankruptcy, or copyright statutes abrogated the States' sovereign immunity. This Court never has awarded relief against a State under any of those statutory schemes."). To date, five Circuits – the Third, Fourth, Fifth, Seventh, and Ninth – have reached the same conclusion as Justices O'Connor and Scalia. *See Nelson*, 301 F.3d at 832; *Mitchell*, 209 F.3d at 1121; *Sacred Heart Hosp.*, 133 F.3d at 243; *Fernandez*, 123 F.3d at 244; *Schlossberg*, 119 F.3d at 1145-46. In doing so, these Circuits have relied on three propositions.

First, under the reasoning of *Seminole Tribe*, "Congress may *not* abrogate state sovereign immunity under its Article I powers." *Mitchell*, 209 F.3d at 1118 (emphasis original). *See also Nelson*, 301 F.3d at 831; *Sacred Heart Hosp.*, 133 F.3d at 243; *Fernandez*, 123 F.3d at 243; *Schlossberg*, 119 F.3d at 1145 (same). Moreover, "there is

simply no principled basis to distinguish the Bankruptcy Clause from other Article I clauses." *Sacred Heart Hosp.*, 133 F.3d at 243. *See also Nelson,* 301 F.3d at 831; *Fernandez,* 123 F.3d at 244. Indeed, the Bankruptcy Clause is inextricably linked to the Commerce Clause. *Fernandez*, 123 F.3d at 244. *See also The Federalist No. 42* at 239 (James Madison) (Clinton Rossiter, ed. 1961, 1999 prtg.) ("The power of establishing uniform laws of bankruptcy is . . . intimately connected with the regulation of commerce, ... "). *Cf. Hoffman,* 492 U.S. at 111 (Marshall, J., joined Brennan, Blackmun, and Stevens, J.J., dissenting) ("I see no reason to treat Congress' power under the Bankruptcy Clause any differently [than the Commerce Clause], for both constitutional provisions give Congress plenary power over national economic activity.").

Second, the fact that the Bankruptcy Clause, unlike other Article I Clauses, contains a uniformity requirement is constitutionally insignificant.[14] *Nelson*, 301 F.3d at 834; *Mitchell*, 209 F.3d at 119; *Sacred Heart*, 133 F.3d at 243; *Fernandez*, 123 F.3d at 244; *Schlossberg*, 119 F.3d at 1145-46. Relying on Justice Frankfurter's concurring opinion in *Vanston Bondholders Protective Comm. v. Green,* 329 U.S. 156, 172 (1946) (Frankfurter, J., concurring), the Circuits repeatedly emphasized that "uniformity" does not require that the States be treated the same as private parties. Rather, "uniformity" simply means only geographic uniformity. *See Nelson,* 301 F.3d at 834; *Sacred Heart*, 133 F.3d at 243; *Fernandez,* 123 F.3d at 244.

---

[14] The term "uniformity requirement" refers to the fact that the Bankruptcy Clause empowers Congress to establish "*uniform Laws* on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, § 8, cl. 4 (emphasis added).

Moreover, those Circuits which had the benefit of this Court's decisions in *Federal Maritime Commission* and *Florida Prepaid* found that the States' sovereign immunity is not diminished even in areas where the National Government is given exclusive control. *Nelson*, 301 F.3d at 834 (interpreting *Federal Maritime Comm'n*); *Mitchell*, 209 F.3d at 1119 (interpreting *Florida Prepaid*).

Third, in addition to dealing with whether Congress' Article I powers could be used to abrogate sovereign immunity and the significance of the uniformity requirement, the Seventh Circuit dealt with an argument that, by surrendering their power to make bankruptcy laws in the Plan of Convention, the States necessarily surrendered their sovereign immunity for bankruptcy proceedings. The Seventh Circuit rejected this argument and observed:

> In *Seminole Tribe*, the Court noted that "under the rationale of *Union Gas*, if the States' partial cession of authority over a particular area [there, interstate commerce] includes cession of the immunity from suit, then their virtually total cession of authority over a different area [i.e., the Indian Commerce Clause] must also include cession of the immunity from suit." In rejecting this rationale, and thus overruling *Union Gas*, the Court held, that "even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. These cases make clear that the States, by ceding certain enumerated legislative powers, did not relinquish their immunity from suit in those areas. And, as we have previously noted, there is nothing in these decisions indicating that bankruptcy should be treated differently than any other Article I power. While the ratification of the Bankruptcy Clause of Article I by the States illustrates that they clearly surrendered their power to enact bankruptcy laws, there is nothing in the text of that clause or in the structure of the Constitution indicating that the States consented to being sued in bankruptcy court. In other words, "the Eleventh Amendment . . . does not free [a State] from federal law, but simply the jurisdiction of federal courts."

Nelson, 301 F.3d at 833 (citations omitted). In other words, there is a fundamental difference between the States surrendering their sovereign authority to legislate in a particular context and the States surrendering their sovereign immunity from suit in a particular context. The fact that the States surrendered sovereign authority to legislate does not mean that the States surrendered immunity from suit.

B. The One Circuit Holding that the Bankruptcy Clause May Be Used To Abrogate Sovereign Immunity

Although the Sixth Circuit had the benefit of *Nelson*, *Mitchell*, *Sacred Heart Hospital*, *Fernandez*, and *Schlossberg* as well as this Court's decisions in *Federal Maritime Commission* and *Florida Prepaid*, it disagreed with Justices O'Connor and Scalia and held that the Article I Bankruptcy Clause could be used to abrogate sovereign immunity. Specifically, it concluded that the presence of the uniformity requirement in the Bankruptcy Clause meant that the States had surrendered *both* their sovereign authority to legislate and their sovereign immunity from suit. In reaching this conclusion, the Sixth Circuit

rejected the three propositions endorsed by the other Circuits.

First, unlike the Third, Fourth, Fifth, Seventh, and Ninth Circuits, the Sixth Circuit interpreted *Seminole Tribe* as leaving open the possibility that Congress could use some of its Article I powers to abrogate sovereign immunity. *Hood I*, 319 F.3d at 761-62. *See also Hood II*, 124 S. Ct. at 1920 (Thomas, J., joined by Scalia, J., dissenting) ("[T]he Court of Appeals held that the Bankruptcy Clause operates differently than Congress' other Article I powers because of its 'uniformity requirement.'"). Indeed, the Sixth Circuit declared that "neither *Seminole Tribe* nor any of the Supreme Court's other recent sovereign immunity cases address Congress's Bankruptcy Clause powers as understood in the plan of the Convention." *Hood I*, 319 F.3d at 761-62.

Second, unlike the other Circuits, the Sixth Circuit found that the uniformity requirement has constitutional significance. *Id.* at 763-64. As explained above, the other Circuits had interpreted the uniformity requirement as merely mandating geographic uniformity rather than uniformity of application. The Sixth Circuit rejected this interpretation. *Id.* at 763-64. Moreover, the other Circuits, interpreting *Florida Prepaid* and *Federal Maritime Commission,* concluded that a national legislative preference for uniformity could not be used to diminish the States' sovereign immunity. However, the Sixth Circuit found that the uniformity requirement was more than a mere legislative preference, it was a constitutional mandate. *See Id.* at 764-67. In the Sixth Circuit's view, "a federal bankruptcy system could cure the previous systems' ills only if it applied uniformly to all creditors and debtors. . . . " *Id.* at 767.

Third, unlike the Seventh Circuit, the Sixth Circuit determined that, at least in the bankruptcy context, the States could not surrender their sovereign authority to legislate without also surrendering their immunity from suit. *Id.* at 765-66. Relying on certain ambiguous phrases in both *The Federalist No. 32* at 166 (Alexander Hamilton) (Clinton Rossiter, ed. 1961, 1999 prtg.) and *The Federalist No. 81* at 455-56 (Alexander Hamilton) (Clinton Rossiter, ed. 1961, 1999 prtg.), the Sixth Circuit declared:

> The question is whether Hamilton's identification of the uniform powers as examples of categories in which states have ceded sovereignty includes the ceding of immunity from suit. We conclude that *No. 32* does in fact refer to the ceding of sovereign immunity. Hamilton's cross-reference to this discussion in *No. 81*'s discussion of ceding sovereign immunity can only suggest that, in the minds of the Framers, ceding sovereignty by the methods described in *No. 32* implies ceding sovereign immunity as discussed in *No. 81*. There is no other explanation for his cross-reference in *No. 81*. Thus *The Federalist No. 81* and *No. 32* suggest that the states ceded their immunity by granting Congress the power to make uniform laws.

Hood I, 319 F.3d at 766. In other words, the Sixth Circuit interpreted the ambiguous writings of one Framer – Hamilton – and concluded that he believed that the States had ceded immunity from suit for bankruptcy proceedings. Because Hamilton may have believed it and because the Sixth Circuit's review of the Ratification Debates indicated no explicit discussion of bankruptcy suits against the States, the Sixth Circuit concluded that the Bankruptcy

Clause included the power to abrogate sovereign immunity. *Id.* at 766-68.

In sum, the Sixth Circuit disagreed with the other five Circuits on the following: (1) whether the Article I powers can be used to abrogate the States' sovereign immunity; (2) the significance of the uniformity requirement in the Bankruptcy Clause; and (3) whether the States' surrender of the sovereign authority to legislate on bankruptcy matters necessarily included a surrender of the sovereign immunity from suits in bankruptcy.

II. THE CONFLICT AMONG THE CIRCUITS HAS SERIOUS CONSEQUENCES FOR THE STATES.

This conflict among the Circuits on the issue of whether the Bankruptcy Clause may be used to abrogate the States' sovereign immunity has serious consequences for the States. This is so for two reasons.

First, state agencies and institutions face the possibility of litigation not only in their own State, but also in every other State of the Union. In the early Twenty-First Century, the States do business with private entities throughout the Nation. When one of those private entities declares bankruptcy and an adversary proceeding results, the States can be forced to litigate in other Circuits. Indeed, in the time since Katz sued the Virginia Institutions in the Eastern District of Kentucky, the Commonwealth of Virginia's agencies and institutions of higher education have been sued in the bankruptcy courts of the District of Delaware, the Northern District of Georgia, the Northern District of Illinois, the District of Maryland, and the Southern District of New York. Virginia's experience is common.

Second, the conflict over whether Congress can use the Bankruptcy Clause to abrogate sovereign immunity leads to different outcomes in different Circuits. It should not matter whether the State is sued in Lexington, Kentucky or Lexington, Virginia, or Lexington, Massachusetts. Yet, at present, it matters a great deal. In Lexington, Kentucky, where these proceedings were commenced, *Hood I* mandates a denial of sovereign immunity and the States must litigate on the merits. In Lexington, Virginia, where Virginia Military Institute is located, *Schlossberg* controls and the case is dismissed on sovereign immunity grounds. In Lexington, Massachusetts, where there is no controlling Circuit authority, the States have to litigate the sovereign immunity issue and, if unsuccessful, litigate on the merits. This difference in outcomes makes it impossible to consistently and efficiently administer State government with regard to responses in bankruptcy. It is intolerable.

III. THIS PETITION PROVIDES AN EXCELLENT VEHICLE FOR RESOLVING THE CONFLICT AMONG THE CIRCUITS.

Moreover, this Petition provides an excellent vehicle for resolving this conflict among the Circuits. This is so for two reasons.

First, unlike *Hood II*, there is no possible resolution based on *in rem* jurisdiction. As explained above, Katz asserts that there was a preferential transfer and commenced adversary proceedings against the Virginia Institutions in an attempt to recover monies allegedly in the possession of the Virginia Institutions. As such, it is fundamentally different from the *Hood II* factual situation. *See Hood II,* 120 S. Ct. at 1914 ("The case before us is thus unlike an adversary proceeding by the bankruptcy

trustee seeking to recover property in the hands of the State on the grounds that the transfer was a voidable preference.").

Second, unlike other attempts to obtain this Court's review of the Sixth Circuit's rationale in *Hood I*, this Petition cannot be resolved on the alternative grounds of waiver of sovereign immunity.[15] As explained above, although there is an argument that the Virginia Military Institute waived its sovereign immunity, there is no such argument with respect to the Central Virginia Community College, New River Community College, and Blue Ridge Community College. If this Court grants review and determines that Congress may not use the Bankruptcy Clause to abrogate sovereign immunity, then the claims against those three institutions will be resolved.[16]

---

[15] For example, in *H.J. Wilson v. Comm'r of Revenue (In re Serv. Merch. Co.)*, 333 F.3d 666 (6th Cir. 2003), *cert. denied*, 124 S. Ct. 2388 (2004), the Sixth Circuit, relying on *Hood I*, held that sovereign immunity did bar an adversary proceeding in bankruptcy. *H.J. Wilson*, 333 F.3d at 668. Massachusetts then sought review of the Sixth Circuit's rationale in *Hood I*. *See* Petition for Certiorari at 6, *Commissioner of Revenue v. H.J Wilson Co., Inc.*, (Dec. 9, 2003) (No. 03-879). However, the Respondent asserted that the correctness of *Hood I* was irrelevant because a proof of claim had been filed and the filing of a proof of claim constituted a waiver of sovereign immunity. *See* Respondent's Brief in Opposition to the Petition for Certiorari at 7, *Commissioner of Revenue v. H.J. Wilson Co., Inc.*, (Jan. 20, 2004) (No. 03-879). The presence of this waiver argument – which would constitute an alternative grounds to affirm and, thus, would allow this Court to avoid deciding the correctness of *Hood I* – presumably was a factor in this Court's denial of certiorari.

[16] Of course, as explained above in note 9, in such a situation, it will be necessary to remand the claims against the Virginia Military Institute to the Sixth Circuit for a determination of the waiver issue.

CONCLUSION

This Petition for a Writ of Certiorari should be GRANTED.

Respectfully submitted,

JERRY W. KILGORE
Attorney General of Virginia

WILLIAM E. THRO
State Solicitor General
Counsel of Record

MAUREEN RILEY MATSEN
Deputy State Solicitor General

CARLA R. COLLINS
VALERIE L. MYERS
RONALD N. REGNERY
Associate State Solicitors General

OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
(804) 786-2436
(804) 786-1991 (facsimile)

Counsel for Respondent

December 29, 2004

APPENDIX

TABLE OF CONTENTS

Page

Opinion of the United States Court of Appeals for the Sixth Circuit.....App. 1

Order of the United States District Court for the Eastern District of Kentucky affirming the orders of the United States Bankruptcy Court for the Eastern District of Kentucky entered April 24, 2003 and May 19, 2003.....App. 3

Order of the United States Bankruptcy Court for the Eastern District of Kentucky denying sovereign immunity to Central Virginia Community College....App. 5

Order of the United States Bankruptcy Court for the Eastern District of Kentucky denying sovereign immunity to Virginia Military Institute.....App. 7

Order of the United States Bankruptcy Court for the Eastern District of Kentucky denying sovereign immunity to New River Community College .....App. 9

Order of the United States Bankruptcy Court for the Eastern District of Kentucky denying sovereign immunity to Blue Ridge Community College .....App. 11

Order of the United States Court of Appeals for the Sixth Circuit denying rehearing *en banc*.....App. 13

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 03-6054

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

In re: WALLACE'S BOOKSTORE, INC. and WALLACE'S BOOK COMPANY Debtors	)	
BERNARD KATZ, Liquidating Supervisor for Wallace's Bookstores, Inc., et al., Appellee, v. CENTRAL VIRGINIA COMMUNITY COLLEGE; VIRGINIA MILITARY INSTITUTE; NEW RIVER COMMUNITY COLLEGE; BLUE RIDGE COMMUNITY COLLEGE, Appellants.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY (Filed Aug. 4, 2004)

Before: SUTTON and COOK, Circuit Judges; ROSEN, District Judge.*

---

* The Honorable Gerald E. Rosen, United States District Judge for the Eastern District of Michigan, sitting by designation.

PER CURIAM. Appellants, four state-supported institutions of higher education in Virginia, brought this suit for the purpose of challenging this court's decision in *Hood v. Tennessee Student Assistance Corporation,* 319 F.3d 755 (6th Cir. 2003) (holding that the Article I Bankruptcy Clause grants Congress the authority to abrogate states' sovereign immunity), *aff'd on other grounds,* 124 S. Ct. 45 (2004). The district court, finding that appellants raised the very arguments that this court rejected in *Hood,* affirmed the orders of the bankruptcy court. Because we are bound to follow a decision of a prior panel, *see Moltan Co. v. Eagle-Picher Indus., Inc.,* 55 F.3d 1171, 1176 (6th Cir. 1995) ("We cannot overturn the prior published decision of another panel and are therefore bound by these previous decisions."), and because the parties agree that *Hood* applies here, we affirm the judgment of the district court.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 03-245-KSF*

IN RE
WALLACE'S BOOKSTORES,
INC., *et al.* DEBTORS
BANKRUPTCY CASE NO.
01-50545

CENTRAL VIRGINIA COMMUNITY COLLEGE APPELLANT

V. **ORDER**

(Filed Aug. 6, 2003)

BERNARD KATZ, LIQUIDATING
SUPERVISOR FOR WALLACE'S
BOOKSTORES, INC., *et al.* APPELLEE

ADVERSARY PROCEEDING NO. 03-5081

* * *

This matter is before the Court on appeal from several orders of the United States Bankruptcy Court for the Eastern District of Kentucky in the underlying adversary proceedings in this consolidated action denying the

---

* This case has been consolidated with three related cases, with the present action as the lead case: *Virginia Military Institute v. Katz*, Civil Action No. 03-246-KSF (E.D. Ky.), *New River Community College v. Katz*, Civil Action No. 03-247-KSF (E.D. Ky.), and *Blue Ridge Community College v. Katz*, Civil Action No. 03-248-KSF (E.D. Ky.). For ease of reference, the Court will use the caption only for the lead action in its orders, although the orders apply equally to all parties in each of the consolidated cases.

appellants' motions to dismiss on the basis of sovereign immunity.

The appellants have sufficiently outlined the factual background and procedural history of these cases in their consolidated brief and, therefore, the Court will not repeat the same here. The constitutional issues raised by the appellants herein are identical to the issues raised by the appellants in *Hood v. Tennessee Student Assistance Corp.*, 319 F.3d 755 (6th Cir. 2003), *petition for cert. filed* No. 02-1606 (May 6, 2003). Thus, this Court must reject the appellants' appeal for the reasons set forth in the *Hood* decision and affirms the rulings of the bankruptcy court. Based on this, there is no need for the Court to address the argument of appellant Virginia Military Institute that the bankruptcy court erred in ruling that it had waived sovereign immunity by filing a proof of claim in the main bankruptcy case.

Accordingly, the Court, being otherwise fully and sufficiently advised, HEREBY ORDERS that

(1) the orders of the United States Bankruptcy Court for the Eastern District of Kentucky entered April 24, 2003, and May 19, 2003, are AFFIRMED; and

(2) judgment will be entered contemporaneously with this order.

This 5/day of August, 2003.

/s/ Karl S. Forester
KARL S. FORESTER,
CHIEF JUDGE

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
(Lexington Division)

IN RE:
WALLACE'S BOOKSTORES, INC., *et al.*

DEBTORS — CASE NO. 01-50545

BERNARD KATZ, LIQUIDATING SUPERVISOR FOR WALLACE'S BOOKSTORES, INC., *et al.* — PLAINTIFF

V. — ADV. NO. 03-5081

CENTRAL VIRGINIA COMMUNITY COLLEGE — DEFENDANT

ORDER MODIFYING ORDER DENYING DEFENDANT'S MOTION TO DISMISS

By Order of April 24, 2003, the Court overruled Defendant's Motion to Dismiss raising the sovereign immunity of the Commonwealth of Virginia, and required Defendant to file its answer to the Complaint within ten days thereafter. The Defendant moved for relief from the requirement that it make answer to the Complaint, provided that it appealed from the denial of its Motion to Dismiss within the permitted time. The Court having heard the arguments of the parties on May 15, 2003, and being otherwise sufficiently advised,

IT IS HEREBY ORDERED AND ADJUDGED that Defendant's Motion is sustained to the extent that the Defendant is granted an extension of time in which to file an Answer, but is otherwise overruled. The Court's Order of April 24, 2003 is hereby modified as follows:

1. This is a core proceeding and this Court has jurisdiction to enter this Order pursuant to 28 U.S.C. §§ 157 and 1334.

2. Congress, through its enactment of 11 U.S.C. §106(a), expressly and within its Constitutional authority, abrogated the states' Eleventh Amendment immunity.

3. Defendant's Motion to Dismiss is hereby DENIED.

4. This is a final and appealable Order.

5. Defendant will [sic] fifteen (15) days from the date of entry of this Order in which to file an Answer to the Adversary Complaint, and ten (10) days from the entry of this Order in which to file a Notice of Appeal.

6. This Order modifies and supersedes the Order entered on April 24, 2003.

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF KENTUCKY

(Lexington Division)

IN RE: WALLACE'S BOOKSTORES, INC., et al.	CASE NO. 01-50545
DEBTORS	
BERNARD KATZ, LIQUIDATING SUPERVISOR FOR WALLACE'S BOOKSTORES, INC., et al.	PLAINTIFF
V.	ADV. NO. 03-5068
VIRGINIA MILITARY INSTITUTE	DEFENDANT

ORDER MODIFYING ORDER DENYING DEFENDANT'S MOTION TO DISMISS

By Order of April 24, 2003, the Court overruled Defendant's Motion to Dismiss raising the sovereign immunity of the Commonwealth of Virginia, and required Defendant to file its answer to the Complaint within ten days thereafter. The Defendant moved for relief from the requirement that it make answer to the Complaint, provided that it appealed from the denial of its Motion to Dismiss within the permitted time. The Court having heard the arguments of the parties on May 15, 2003, and being otherwise sufficiently advised,

IT IS HEREBY ORDERED AND ADJUDGED that Defendant's Motion is sustained to the extent that the Defendant is granted an extension of time in which to file an Answer, but is otherwise overruled. The Court's Order of April 24, 2003 is hereby modified as follows:

1. This is a core proceeding and this Court has jurisdiction to enter this Order pursuant to 28 U.S.C. §§ 157 and 1334.

2. Congress, through its enactment of 11 U.S.C. § 106(a), expressly and within its Constitutional authority, abrogated the states' Eleventh Amendment immunity.

3. Defendant's Motion to Dismiss is hereby DENIED.

4. Defendant shall have fifteen (15) days from the date of entry of this Order in which to file an Answer to the Adversary Complaint.

5. This Order modifies and supersedes the Order entered on April 24, 2003.

[SEAL]
Signed By:
William S. Howard
Bankruptcy Judge
Dated: Monday, May 19, 2003
(wsh)

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
(Lexington Division)

IN RE: WALLACE'S BOOKSTORES, INC., et al.	CASE NO. 01-50545
DEBTORS	
BERNARD KATZ, LIQUIDATING SUPERVISOR FOR WALLACE'S BOOKSTORES, INC., et al.	PLAINTIFF
V.	ADV. NO. 03-5093 41
NEW RIVER COMMUNITY COLLEGE	DEFENDANT

ORDER MODIFYING ORDER DENYING DEFENDANT'S MOTION TO DISMISS

By Order of April 24, 2003, the Court overruled Defendant's Motion to Dismiss raising the sovereign immunity of the Commonwealth of Virginia, and required Defendant to file its answer to the Complaint within ten days thereafter. The Defendant moved for relief from the requirement that it make answer to the Complaint, provided that it appealed from the denial of its Motion to Dismiss within the permitted time. The Court having heard the arguments of the parties on May 15, 2003, and being otherwise sufficiently advised,

IT IS HEREBY ORDERED AND ADJUDGED that Defendant's Motion is sustained to the extent that the Defendant is granted an extension of time in which to file an Answer, but is otherwise overruled. The Court's Order of April 24, 2003 is hereby modified as follows:

1. This is a core proceeding and this Court has jurisdiction to enter this Order pursuant to 28 U.S.C. §§ 157 and 1334.

2. Congress, through its enactment of 11 U.S.C. § 106(a), expressly and within its Constitutional authority, abrogated the states' Eleventh Amendment immunity.

3. Defendant's Motion to Dismiss is hereby DENIED.

4. This is a final and appealable Order.

5. Defendant will [sic] fifteen (15) days from the date of entry of this Order in which to file an Answer to the Adversary Complaint, and ten (10) days from the entry of this Order in which to file a Notice of Appeal.

6. This Order modifies and supersedes the Order entered on April 24, 2003.

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
(Lexington Division)

IN RE: WALLACE'S BOOKSTORES, INC., et al.	CASE NO. 01-50545
DEBTORS	
BERNARD KATZ, LIQUIDATING SUPERVISOR FOR WALLACE'S BOOKSTORES, INC., et al.	PLAINTIFF
V.	ADV. NO. 03-5093
BLUE RIDGE COMMUNITY COLLEGE	DEFENDANT

ORDER MODIFYING ORDER DENYING DEFENDANT'S MOTION TO DISMISS

By Order of April 24, 2003, the Court overruled Defendant's Motion to Dismiss raising the sovereign immunity of the Commonwealth of Virginia, and required Defendant to file its answer to the Complaint within ten days thereafter. The Defendant moved for relief from the requirement that it make answer to the Complaint, provided that it appealed from the denial of its Motion to Dismiss within the permitted time. The Court having heard the arguments of the parties on May 15, 2003, and being otherwise sufficiently advised,

IT IS HEREBY ORDERED AND ADJUDGED that Defendant's Motion is sustained to the extent that the Defendant is granted an extension of time in which to file an Answer, but is otherwise overruled. The Court's Order of April 24, 2003 is hereby modified as follows:

1. This is a core proceeding and this Court has jurisdiction to enter this Order pursuant to 28 U.S.C. §§ 157 and 1334.

2. Congress, through its enactment of 11 U.S.C. § 106(a), expressly and within its Constitutional authority, abrogated the states' Eleventh Amendment immunity.

3. Defendant's Motion to Dismiss is hereby DENIED.

4. This is a final and appealable Order.

5. Defendant will [sic] fifteen (15) days from the date of entry of this Order in which to file an Answer to the Adversary Complaint, and ten (10) days from the entry of this Order in which to file a Notice of Appeal.

6. This Order modifies and supersedes the Order entered on April 24, 2003.

No. 03-6054

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

N RE: WALLACE'S BOOKSTORE, INC. AND WALLACE'S BOOK COMPANY, Debtors.	)	ORDER (Filed Sep. 30, 2004)
BERNARD KATZ, LIQUIDATING SUPERVISOR FOR WALLACE'S BOOKSTORES, INC., ET AL., Appellee, v. CENTRAL VIRGINIA COMMUNITY COLLEGE, ET AL., Appellants.	)	

BEFORE: SUTTON and COOK, Circuit Judges; and ROSEN,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

---

* Hon. Gerald E. Rosen, United States District Judge for the Eastern District of Michigan, sitting by designation.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

(2)

Supreme Court, U.S.
FILED
MAR 2 - 2005
OFFICE OF THE CLERK

No. 04-885

In The Supreme Court of the United States

CENTRAL VIRGINIA COMMUNITY COLLEGE,
VIRGINIA MILITARY INSTITUTE,
NEW RIVER COMMUNITY COLLEGE, and
BLUE RIDGE COMMUNITY COLLEGE,

Petitioners,

v.

BERNARD KATZ, Liquidating Supervisor of the Bankruptcy Estate in *In re Wallace's Bookstores, Inc.*,

Respondent.

On Petition For A Writ Of *Certiorari*
To The United States Court Of Appeals
For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

KIM MARTIN LEWIS
DINSMORE & SHOHL LLP
255 East Fifth St., Suite 1900
Cincinnati, Ohio 45202
(513) 977-8200

P. ANTHONY SAMMONS
Counsel of Record
DINSMORE & SHOHL LLP
250 West Main St.,
Suite 1400
Lexington, Kentucky 40507
(859) 425-1000

Counsel for Respondent

March 2, 2005

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the Eleventh Amendment allows a State to bar an adversary proceeding brought against the State in bankruptcy court to avoid preferential transfers and to recover money owed to the debtor.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	2
A. Petitioners Have Waived Sovereign Immunity In This Case	2
B. The Lower Courts Should Be Given The Opportunity To Consider This Court's Recent Decision In *Hood*	5
C. The Decision Below Is Correct	6
CONCLUSION	8

TABLE OF AUTHORITIES

Page

FEDERAL CASES

In re 360networks (USA), Inc., 316 B.R. 797 (Bankr. S.D.N.Y. 2004) 5

Alden v. Maine, 527 U.S. 706 (1999) 7

Arecibo Community Health Care, Inc. v. Puerto Rico, 270 F.3d 17 (1st Cir. 2001) 2

In re Charter Oak Associates, 361 F.3d 760 (2d Cir. 2004) 4

Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) 7

DeBauche v. Virginia Commonwealth University, 7 F. Supp. 2d 718 (E.D. Va. 1998) 3

Department of Transport & Development v. PNL Asset Management Co., 123 F.3d 241 (5th Cir. 1997) 6

Flores v. Illinois Department of Public Health, 300 B.R. 599 (Bankr. D. Vt. 2003) 8

Gardner v. New Jersey, 329 U.S. 565 (1947) 2

Hood v. Tennessee Student Assistance Corp., 319 F.3d 755 (6th Cir. 2003) ..... *passim*

In re Lazar, 237 F.3d 967 (9th Cir. 2001) 2

Mitchell v. Franchise Tax Board, 209 F.3d 1111 (9th Cir. 2000) 6

Nelson v. La Crosse Cty. District Attorney, 301 F.3d 820 (7th Cir. 2002) 6

In re Pegasus Gold Corp., 2005 WL 53427 (9th Cir. 2005) 6

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) 6, 7, 8

TABLE OF AUTHORITIES

Page

In re Straight, 143 F.3d 1387 (10th Cir. 1998) 3

Tennessee Student Assistance Corp. v. Hood, 124 S. Ct. 1905 (2004) ..... *passim*

University of Va. v. Robertson, 243 B.R. 657 (W.D. Va. 2000) 3

FEDERAL STATUTES

11 U.S.C. § 106(a) 6

11 U.S.C. § 502(d) 1, 5

11 U.S.C. §§ 542, 547, 550 1

STATE STATUTES

Va. Code Ann. §§ 23-9.3, 23-9.5, 23-9.6:1, 23-9.9 23-14, 23-215 3

Va. Code Ann. §§ 2.2-4801, 2.2-4806 4

STATEMENT OF THE CASE

Before it filed for bankruptcy under Chapter 11 in February 2001, Wallace's Bookstores, Inc. ("Wallace's") operated a nationwide chain of college bookstores. Wallace's business included relationships with the Petitioners, four Virginia colleges organized and funded by the Commonwealth.

After the bankruptcy proceeding began, the Respondent Bernard Katz, the liquidating supervisor of the bankruptcy estate, commenced adversary proceedings against each of the Petitioners. In those proceedings, Mr. Katz alleged claims under 11 U.S.C. §§ 547 and 550 to avoid and recover "preferential transfers," which occurred shortly before Wallace's filed for bankruptcy, and claims under § 542 and state law to collect money owed to Wallace's by the Petitioners. The complaints also sought orders under 11 U.S.C. § 502(d) disallowing claims by each Petitioner filed against the bankrupt estate, unless that Petitioner paid the money it owed to the estate. Two of the four complaints also sought to avoid and recover preferential transfers under Kentucky law.

Prior to the adversary proceeding being filed against it, Petitioner Virginia Military Institute ("VMI") filed a proof of claim in Wallace's Chapter 11 bankruptcy case.

Petitioners jointly moved to dismiss the four complaints on the ground that the actions were barred by sovereign immunity. Relying on *Hood v. Tennessee Student Assistance Corp.*, 319 F.3d 755 (6th Cir. 2003), which held that Congress has authority to abrogate sovereign immunity under the "Bankruptcy Clause" of Article I of the U.S. Constitution, the United States Bankruptcy Court for the Eastern District of Kentucky denied the motion. The

Petitioners appealed to the district court, which affirmed the bankruptcy court's decision.

The Virginia institutions then appealed to the United States Court of Appeals for the Sixth Circuit. While the appeal was pending, this Court issued its decision in *Tennessee Student Assistance Corp. v. Hood*, 124 S. Ct. 1905 (2004). In *Hood*, the debtor, in the course of her Chapter 7 bankruptcy, had sought discharge of student loans held by the Tennessee Student Assistance Corporation, a state entity. The question originally presented in that case was the same question presented by the Virginia Petitioners here: whether the Bankruptcy Clause grants Congress authority to abrogate state sovereign immunity from private suits. *Id.* However, while the Court discussed considerations pertinent to resolution of the sovereign immunity question, it did not decide that issue. Rather, it held that the discharge proceeding was an *in rem* action that did not implicate sovereign immunity. *Id.* at 1912-13.

Three months after this Court issued the decision in *Hood*, the Sixth Circuit decided the instant case, affirming the district court's decision in an unpublished *per curiam* opinion. (Pet. App. 1).

REASONS FOR DENYING THE WRIT

A. Petitioners Have Waived Sovereign Immunity In This Case.

A state's filing of a proof of claim in a bankruptcy case operates as a waiver of sovereign immunity for claims asserted against the state. *See Gardner v. New Jersey*, 329 U.S. 565, 573-74 (1947); *Arecibo Community Health Care, Inc. v. Puerto Rico*, 270 F.3d 17, 28 (1st Cir. 2001); *In re Lazar*, 237 F.3d 967, 978 (9th Cir. 2001); *In re Straight*, 143 F.3d 1387, 1392 (10th Cir. 1998). VMI filed a proof of claim in Wallace's Chapter 11 case prior to Katz's institution of the adversary complaints against the Petitioners. Accordingly, Virginia's claim to sovereign immunity, and thus the claim of each petitioner, has been waived.

In the present case, the Petitioners' assertion of sovereign immunity derives from their status as "arms of the state" of Virginia. The Petitioners assert that the immunity enjoyed by the Commonwealth of Virginia extends to them because, among other things, the state treasury will ultimately be responsible for paying any judgment against them. Moreover, the state Attorney General's Office acts as their legal counsel; they are designated by statute as "governmental instrumentalities," Va. Code Ann. § 23-14; *see also* Va. Code Ann. § 23-215 (referring to Virginia Community College System as a "state agency"); and each is subject to the oversight of the State Council on Higher Education, Va. Code Ann. §§ 23-9.3, 23-9.5, 23-9.6:1, 23-9.9. *See DeBauche v. Virginia Commonwealth Univ.*, 7 F. Supp. 2d 718, 722 & n.4 (E.D. Va. 1998). As an arm of the state, each of the institutions is "considered the Commonwealth of Virginia for purposes of sovereign immunity." (Pet. at ii, n.1). In one of the cases cited by the Petitioners on this point, the court explained that the University of Virginia could advance Eleventh Amendment immunity "as if [it] were Virginia itself," and thus the opinion used the name of the university "interchangeably" with the name "Virginia." *University of Va. v. Robertson*, 243 B.R. 657, 661 n.4 (W.D. Va. 2000).

Thus, VMI's claim to sovereign immunity actually belongs to the Commonwealth of Virginia. An act resulting in the waiver of sovereign immunity by a state entity

operates as a waiver with regard to the state itself. When VMI filed its proof of claim, its act operated as a waiver of Virginia's sovereign immunity, thereby constituting a waiver on behalf of Virginia's other state agencies. In *In re Charter Oak Associates*, 361 F.3d 760 (2d Cir. 2004), the Second Circuit recognized the full implication of a state entity's claim to sovereign immunity and its waiver of that immunity. The Second Circuit held that, when one Connecticut agency filed a proof of claim in a bankruptcy proceeding, it waived Eleventh Amendment immunity for other Connecticut agencies as well. In essence, any sovereign immunity enjoyed by the state of Connecticut was waived when its agency filed a proof of claim. *Id.* at 768. In reaching its holding, the Second Circuit placed great weight on the fact that any recovery by a Connecticut state agency redounds to the benefit of the Connecticut state treasury. *Id.* at 772. Connecticut law further provided that one state agency can offset an individual's debt to it against amounts owed by other state agencies to that individual. *Id.* The Virginia Code codifies a similar procedure. *See* Va. Code Ann. §§ 2.2-4801, 2.2-4806.

Virginia cannot have it both ways. It cannot file a claim in bankruptcy court, thereby seeking to gain the benefits provided to creditors under the Bankruptcy Code, yet still invoke sovereign immunity as a shield to the underlying adversary proceedings. Virginia's sovereign immunity in this bankruptcy case has been waived, and the Petitioners therefore have no basis to assert it. Thus, this case does not present the question on which Petitioners seek *certiorari*. Whether Congress can abrogate Virginia's immunity is not at issue because that immunity has been waived here.

B. The Lower Courts Should Be Given The Opportunity To Consider This Court's Recent Decision In *Hood*.

Just last May, this Court decided *Hood*, a case in which the petition presented the very same question that Petitioners seek to present here. The Court did not decide that question. But its decision on the alternative ground that the bankruptcy court's exercise of *in rem* jurisdiction to discharge a debt does not implicate the Eleventh Amendment offers new guidance to lower courts in bankruptcy proceedings involving a state entity by highlighting the circumstances in which bankruptcy claims do not implicate Eleventh Amendment concerns.

Aside from the Sixth Circuit, only one court has considered the ramifications of *Hood* on adversary proceedings brought against a state to avoid a preferential transfer. *See In re 360networks (USA), Inc.*, 316 B.R 797 (Bankr. S.D.N.Y. 2004). That court concluded that "a court's jurisdiction over preferential transfers arises from its exclusive jurisdiction over the property of the debtor," and, accordingly, actions to avoid preferential transfers are within the court's *in rem* jurisdiction. *Id.* at 803. Thus, under *Hood*, such actions do not implicate state sovereign immunity. The court in *In re 360networks* further held that a bankruptcy court may lack jurisdiction to order a state to return money to the debtor, but that a court could grant partial relief under 11 U.S.C. § 502(d), which requires a court to disallow claims of an entity that has received a preferential transfer. *Id.* at 805.

Relying on pre-*Hood* cases, the Petitioners describe a circuit split based on cases from five circuits. (Pet. at 7).

Yet none of the circuits have addressed the issue presented here in the year since *Hood*.[1] And at least two of the cases cited by the Petitioners are directly counter to *Hood*. *See Mitchell v. Franchise Tax Bd.*, 209 F.3d 1111 (9th Cir. 2000) (state immune from proceeding to discharge a debt); *Department of Transp. & Dev. v. PNL Asset Management Co.*, 123 F.3d 241 (5th Cir. 1997) (state immune from proceeding to resolve title to property).[2] Additional time is therefore necessary to allow the lower courts to apply *Hood* before this Court takes up the issue for a second time.

C. The Decision Below Is Correct.

In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), the Court presented a two-part test for determining whether Congress had abrogated state sovereign immunity in a constitutionally permissible manner. First, the Court asked whether "Congress has unequivocally expresse[d] its intent to abrogate the immunity." *Id.* at 55 (citation omitted). In the present case, Congress made its intention to abrogate sovereign immunity unmistakably clear in the Bankruptcy Code. *See* 11 U.S.C. § 106(a) ("sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section . . .").

---

[1] In a recent post-*Hood* case, the Ninth Circuit assumed that the state had Eleventh Amendment immunity from suit in the bankruptcy proceeding, but it did not analyze or decide the issue. *In re Pegasus Gold Corp.*, 2005 WL 53427 (9th Cir. 2005).

[2] Another of the cases on which Petitioners rely arose in a factual scenario far afield from the adversary proceedings in this case. *E.g.*, *Nelson v. La Crosse Cty. Dist. Attorney*, 301 F.3d 820 (7th Cir. 2002) (debtor sought injunction to block state from commencing criminal prosecution for restitution of money she allegedly embezzled).

Second, this Court in *Seminole Tribe* looked to whether Congress's attempt to abrogate state sovereign immunity was "pursuant to a valid exercise of power." 517 U.S. at 55 (citation omitted). Article I, section 8 of the United States Constitution grants to Congress authority "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." The determination whether the Eleventh Amendment diminished that authority turns on the structure of the original Constitution. As this Court has stated, "immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional amendments." *Alden v. Maine*, 527 U.S. 706, 713 (1999). The Eleventh Amendment did not alter the purposes of the Constitutional Convention and was intended only "to restore, not change, the structure established at the Convention that was apparently distorted by the" decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). 527 U.S. at 722-23.

In the Sixth Circuit's decision in *Hood*, the court analyzed the extent to which the Convention considered whether federal control over bankruptcy was a necessity. *Hood*, 319 F.3d at 763-65. After lengthy discussion, the Sixth Circuit concluded that the states' immunity was altered by the plan of the Convention, that the states had ceded their sovereignty at that time with regard to bankruptcy, and that Congress thus had the power to abrogate state sovereign immunity under its authority to make laws respecting bankruptcy. *Id.* at 767. This conclusion recognized both the Framers' intent to provide consistency in the treatment of debtors, which had varied greatly under the application of disparate state insolvency laws,

and their concern that individual states not be able to defeat the purposes fostered by bankruptcy relief. *Id.* 764-65.

Although some circuit courts have held otherwise, none of them undertook the "meticulous[] research" and careful analysis of *Hood*, instead offering only a "mechanical application of *Seminole Tribe*" without regard to the distinct language of the Bankruptcy Clause and the Framers' intent when empowering Congress with authority over bankruptcy. *Flores v. Illinois Dept. of Public Health*, 300 B.R. 599, 603 & n.4 (Bankr. D. Vt. 2003). Based on its careful analysis and consideration of the Framers' intent, the Sixth Circuit reached the correct result.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

P. ANTHONY SAMMONS
Counsel of Record
DINSMORE & SHOHL LLP
250 West Main St.
Suite 1400
Lexington, Kentucky 40507
(859) 425-1000

KIM MARTIN LEWIS
DINSMORE & SHOHL LLP
255 East Fifth St., Suite 1900
Cincinnati, Ohio 45202
(513) 977-8200

March 2, 2005

Supreme Court, U.S.
FILED
MAR 2 - 2005
OFFICE OF THE CLERK

No. 04-885

In The Supreme Court Of The United States

CENTRAL VIRGINIA COMMUNITY COLLEGE,
VIRGINIA MILITARY INSTITUTE,
NEW RIVER COMMUNITY COLLEGE, and
BLUE RIDGE COMMUNITY COLLEGE,
Petitioners,

v.

BERNARD KATZ, Liquidating Supervisor for Wallace's Bookstores, Inc.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

BRIEF OF OHIO AND 48 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

JIM PETRO
Attorney General of Ohio
DOUGLAS R. COLE
State Solicitor
ELISE W. PORTER*
Assistant Solicitor
**Counsel of Record*
30 East Broad Street, 17th Floor
Columbus, OH 43215-3400
614-466-8980
614-466-5087 fax
Counsel for *Amici* States

TROY KING
Attorney General
State of Alabama

SCOTT J. NORDSTRAND
Acting Attorney General
State of Alaska

TERRY GODDARD
Attorney General
State of Arizona

MIKE BEEBE
Attorney General
State of Arkansas

BILL LOCKYER
Attorney General
State of California

JOHN W. SUTHERS
Interim Attorney General
State of Colorado

RICHARD BLUMENTHAL
Attorney General
State of Connecticut

M. JANE BRADY
Attorney General
State of Delaware

CHARLES J. CRIST, JR.
Attorney General
State of Florida

THURBERT E. BAKER
Attorney General
State of Georgia

MARK J. BENNETT
Attorney General
State of Hawaii

LAWRENCE G. WASDEN
Attorney General
State of Idaho

LISA MADIGAN
Attorney General
State of Illinois

STEVE CARTER
Attorney General
State of Indiana

THOMAS J. MILLER
Attorney General
State of Iowa

PHILL KLINE
Attorney General
State of Kansas

GREGORY D. STUMBO
Attorney General
Commonwealth of Kentucky

CHARLES C. FOTI, JR.
Attorney General
State of Louisiana

G. STEVEN ROWE
Attorney General
State of Maine

J. JOSEPH CURRAN, JR.
Attorney General
State of Maryland

THOMAS F. REILLY
Attorney General
Commonwealth of
Massachusetts

MICHAEL A. COX
Attorney General
State of Michigan

MIKE HATCH
Attorney General
State of Minnesota

JIM HOOD
Attorney General
State of Mississippi

JEREMIAH W. (JAY)
NIXON
Attorney General
State of Missouri

MIKE McGRATH
Attorney General
State of Montana

JON BRUNING
Attorney General
State of Nebraska

BRIAN SANDOVAL
Attorney General
State of Nevada

KELLY AYOTTE
Attorney General
State of New Hampshire

PETER C. HARVEY
Attorney General
State of New Jersey

PATRICIA A. MADRID
Attorney General
State of New Mexico

ELIOT SPITZER
Attorney General
State of New York

ROY COOPER
Attorney General
State of North Carolina

WAYNE STENEHJEM
Attorney General
State of North Dakota

W.A. DREW EDMONDSON
Attorney General
State of Oklahoma

HARDY MYERS
Attorney General
State of Oregon

THOMAS W. CORBETT, JR.
Attorney General
Commonwealth of
Pennsylvania

PATRICK C. LYNCH
Attorney General
State of Rhode Island

HENRY DARGAN
McMASTER
Attorney General
State of South Carolina

LAWRENCE E. LONG
Attorney General
State of South Dakota

PAUL G. SUMMERS
Attorney General
State of Tennessee

GREG ABBOTT
Attorney General
State of Texas

MARK L. SHURTLEFF
Attorney General
State of Utah

WILLIAM H. SORRELL
Attorney General
State of Vermont

ROB McKENNA
Attorney General
State of Washington

DARRELL V. McGRAW, JR.
Attorney General
State of West Virginia

PEGGY A.
LAUTENSCHLAGER
Attorney General
State of Wisconsin

PATRICK J. CRANK
Attorney General
State of Wyoming

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

STATEMENT OF *AMICI* INTEREST 1

REASONS FOR GRANTING THE WRIT 2

I. The Circuits Are Split on the Question Presented. 3

II. This Case Squarely Presents the Issue of Congress' Power to Abrogate Eleventh Amendment Immunity in the Bankruptcy Context. 6

III. Resolving This Issue is Necessary to Resolving Other Bankruptcy Issues of Importance to the States. 10

CONCLUSION 11

TABLE OF AUTHORITIES

PAGE

Cases

Alden v. Maine,
527 U.S. 706 (1999) 7

Arecibo Community Health Care, Inc. v. Puerto Rico Dept. of Health,
270 F.3d 17 (1st Cir. 2001) 4

Atascadero State Hosp. v. Scanlon,
473 U.S. 234 (1985) 7

Board of Trustees v. Garrett,
531 U.S. 356 (2001) 7

City of Boerne v. Flores,
521 U.S. 507 (1997) 7, 10

College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board,
527 U.S. 666 (1999) 7, 10

Dept. of Transp. & Dev. v. PNL Asset Mgmt. Co. LLC,
123 F.3d 241 (5th Cir. 1997) 3, 5

Federal Maritime Commission v. South Carolina Ports Authority,
535 U.S. 743 (2002) 9

Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank,
527 U.S. 627 (1999) 7, 9

Gardner v. New Jersey,
329 U.S. 565 (1947) 10

Georgia Higher Education Assistance Corp. v. Crow,
2004 U.S. App. LEXIS 26872 ..... 3, 4, 5, 8

Gosselin v. IRS,
276 F.3d 70 (1st Cir. 2002) 4

Hood v. Tennessee Student Assistance Corp.,
319 F.3d 755 (6th Cir 2003) 3, 4, 5, 8

Idaho v. Coeur d'Alene Tribe,
521 U.S. 261 (1997) 7

In the Matter of Merchant's Grain, Inc.,
No. 95-561 7

Kimel v. Florida Bd. of Regents,
528 U.S. 62 (2000) 7

May v. Missouri Dept. of Revenue,
2 Fed. Appx. 681 (8th Cir. 2001) 4

Mitchell v. Franchise Tax Bd.,
209 F.3d 1111 (9th Cir. 2000) 3

Nelson v. Lacrosse Co. Dist. Atty.,
301 F.3d 820 (7th Cir. 2002) 3

Nevada Dept. of Human Resources v. Hibbs,
538 U.S. 721 (2003) 7

Pennsylvania v. Union Gas Co.,
491 U.S. 1 (1988) 9

Rose v. Missouri Student Loan Program,
187 F.3d 926 (8th Cir. 1999) 4

Sacred Heart Hosp. of Norristown v. Pa.,
133 F.3d 237 (3d Cir. 1998) 3, 10

Schlossberg v. Md.,
119 F.3d 1140 (4th Cir. 1997) 3, 5

Seminole Tribe of Florida v. Florida,
517 U.S. 44 (1996) ..... passim

Straight v. Wyoming DOT,
143 F.3d 1387 (10th Cir. 1998) 4

Sturgis v. Crowninshield,
17 U.S. (4 Wheat.) 122 (1819) 9

Tennessee Student Assistance Corp. v. Hood,
124 S.Ct. 1905 (2004) 2, 3, 4, 8

United States v. Kras,
409 U.S. 434 (1973) 10

Vanston Bondholders Protective Comm. v. Green,
329 U.S. 156 (1946) 6, 9

Statutes

11 U.S.C. § 106(a) 3, 4, 10

Constitutional Provisions

U.S. Const., Art. I, § 8 ..... 1, 2, 6

STATEMENT OF *AMICI* INTEREST

Amici State of Ohio and 48 other States have a critical interest in this case, as it implicates one of the most controversial and publicly-debated legal issues of recent years—the power of Congress to abrogate the States' Eleventh Amendment immunity. The issue is presented here in an area vital to a State's ability to control its fisc: bankruptcy.

The States of Ohio, Michigan, Tennessee and Kentucky plainly have a strong interest in the resolution of the case, as they are within the jurisdiction of the Sixth Circuit. But the other *amici* States also have a strong interest in the case because—unlike in other fields of federal jurisprudence—it is common for States to be involved in bankruptcies in Circuits other than their own. For instance, in 2004, the Missouri Department of Revenue, Bankruptcy Unit, opened 5,878 cases, of which 389 or 15% were out-of-state cases. Connecticut had an interest in approximately 300 out-of-state bankruptcy cases in 2004. And of Washington's open bankruptcy cases for 2004, almost 12% were in circuits other than the Ninth.

The possibility of being haled into bankruptcy court across the United States gives the States a strong interest in ensuring that the constitutional requirement of "uniform Laws on the subject of Bankruptcies throughout the United States" is met. U.S. Const., Art. I, § 8. The current split among the circuits on the issue of sovereign immunity exposes the States to varying treatment depending on the circuit in which the bankruptcy proceeds, thereby frustrating clear constitutional intent.

Indeed, this case provides the perfect example of lack of uniformity. Virginia was sued in Kentucky, where Sixth

Circuit precedent holds that Congress successfully abrogated Virginia's sovereign immunity in bankruptcy. In contrast, if Virginia had been sued in Virginia, it would have enjoyed sovereign immunity under Fourth Circuit precedent, which holds that Congress did not successfully abrogate the States' immunity in bankruptcy.

In short, because the States have no control over a debtor's choice of forum, this case could have a significant impact on the public fisc of all the States, not just those in the Sixth Circuit. *Amici* States therefore urge this Court to grant certiorari and reverse.

REASONS FOR GRANTING THE WRIT

The petition should be granted for at least three reasons. First, there is a conflict between the Sixth Circuit and six other circuits. Moreover, it is a particularly harmful conflict because a State is often haled into bankruptcy court outside its home circuit. The split thereby frustrates clear constitutional demand for "uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const., Art. I, § 8. Second, this case permits the Court to reach and resolve the abrogation issue it left open in *Tennessee Student Assistance Corp. v. Hood*, 124 S.Ct. 1905 (2004) (*Hood II*). The Sixth Circuit ignores the entire body of recent case law, as well as the intent of the Founders, on the issue of Eleventh Amendment immunity of the States and the power of Congress to abrogate Eleventh Amendment immunity in the area of bankruptcy. Finally, resolution of the abrogation issue is a necessary predicate to the resolution of additional bankruptcy issues of great importance to the States, including the scope of a proof-of-claim waiver of sovereign immunity.

I. The Circuits Are Split on the Question Presented.

In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), the Court made clear that Congress lacks power to abrogate a State's sovereign immunity by passing legislation under Article I. As detailed in section II, below, the Court has reiterated this principle numerous times since *Seminole Tribe*. However, Congress had attempted an express abrogation under its Article I powers in the 1994 amendments to the Bankruptcy Code. 11 U.S.C. § 106(a).

The Third, Fourth, Fifth, Seventh, Ninth and Eleventh circuits have held that § 106(a) is unconstitutional because—for purposes of Eleventh Amendment immunity—no principled difference exists between the Bankruptcy Clause and other Article I clauses. *Georgia Higher Education Assistance Corp. v. Crow (In re Crow)*, 2004 U.S. App. LEXIS 26872; *Nelson v. Lacrosse Co. Dist. Atty. (In re Nelson)*, 301 F.3d 820 (7th Cir. 2002); *Mitchell v. Franchise Tax Bd. (In re Mitchell)*, 209 F.3d 1111, 1120 (9th Cir. 2000); *Sacred Heart Hosp. of Norristown v. Pa. (In re Sacred Heart Hosp. of Norristown)*, 133 F.3d 237, 245 (3d Cir. 1998); *Dept. of Transp. & Dev. v. PNL Asset Mgmt. Co. LLC (In re Fernandez)*, 123 F.3d 241, 246 (5th Cir. 1997); *Schlossberg v. Md. (In re Creative Goldsmiths of Wash., D.C., Inc.)*, 119 F.3d 1140, 1147 (4th Cir. 1997). Of particular interest is *Crow*, in which the Eleventh Circuit distinguished *Hood II* and held that in *in personam* actions—as opposed to the *in rem* discharge proceedings at issue in *Hood*—Congress has not successfully abrogated the States' sovereign immunity. *Crow* at *16.

However, the Sixth Circuit in *Hood v. Tennessee Student Assistance Corp. (In re Hood)*, 319 F.3d 755 (6th Cir 2003) (*Hood I*), held that the States lacked any sovereign immunity in the bankruptcy context—a radical departure

from the other circuits to have considered the issue. Because the Court did not reach the abrogation issue in resolving *Hood II*, *Hood I* remains binding precedent in the Sixth Circuit. Indeed, it was applied in the case below. *Hood I* held that the States ceded their sovereign *immunity* in bankruptcy court, as well as their sovereign *authority* over the area of bankruptcy in the plan of the Constitutional Convention. The *Hood I* Court thus concluded that Congress had the power to abrogate—and did abrogate—the States' immunity in enacting 11 U.S.C. § 106(a). In doing so, the Sixth Circuit created a clear conflict with all other circuits that have reached the issue.

The importance of resolving this conflict now is demonstrated by the frequency with which it arises. Six circuits have already weighed in. Of the remaining five, three have faced it, although they ultimately resolved the case on other grounds. For example, the First Circuit has at least twice been presented with—but not reached—the abrogation issue. *Gosselin v. IRS* (*In re Gosselin*), 276 F.3d 70 (1st Cir. 2002) (dismissal affirmed on other grounds); *Arecibo Community Health Care, Inc. v. Puerto Rico Dept. of Health* (*In re Arecibo Community Health Care*), 270 F.3d 17 (1st Cir. 2001) (dismissed on waiver). The Eighth and Tenth Circuits have similarly encountered but avoided the abrogation issue by holding that the State had waived its immunity. *Rose v. Missouri Student Loan Program* (*In re Rose*), 187 F.3d 926 (8th Cir. 1999) (*but see May v. Missouri Dept. of Revenue* (*In re May*), 2 Fed. Appx. 681 (8th Cir. 2001) (implying immunity)); *Straight v. Wyoming DOT* (*In re Straight*), 143 F.3d 1387 (10th Cir. 1998). In addition, since the Court decided *Hood II*, the Eleventh Circuit has faced and resolved the issue in *Crow*. In short, this issue will not go away.

Moreover, the various circuit cases have considered all arguments pertinent to the issue. The arguments considered in the Eleventh Circuit in *Crow* last month are virtually the same as those considered by the Fourth and Fifth Circuits in *Schlossberg* and *Fernandez* immediately after *Seminole Tribe* was decided. The issue is ripe for consideration by the Court.

Given the importance of bankruptcy to both States and individuals, and this Court's recent holdings on the Eleventh Amendment, the conflict in the circuits on this recurring issue is alone sufficient reason for the Court to grant certiorari.

Moreover, the division and confusion on this issue is particularly harmful to the States because it is far more likely than in other areas of the law that a State will find itself haled into bankruptcy court outside its home circuit. Indeed, this case provides the perfect example. Virginia was sued in Kentucky, where Sixth Circuit precedent—set in *Hood I* and followed in this case—holds that Congress successfully abrogated Virginia's sovereign immunity in bankruptcy. If not reversed, Virginia will have to litigate its case on the merits. In contrast, if Virginia had been sued at home, where Fourth Circuit precedent—set in *Schlossberg*—holds that Congress did not successfully abrogate the States' immunity in bankruptcy, Virginia would have enjoyed full sovereign immunity and been free of litigation. Thus, the conflict of authority prevents a State from effectively planning and guiding its actions based on the law of its own circuit—which the States do in most other areas of federal law.

In addition, of course, debtors now know that they have a "free pass" in the Sixth Circuit—they can file adversary proceedings against a State without having to worry about immunity. Debtors with substantial claims

against a State will therefore have a strong motive to file for bankruptcy in a Sixth Circuit State if they can. The chances of bankruptcy litigation in a Sixth Circuit court are therefore increased for every State.

Finally, conflict in the circuits and lower courts is particularly harmful in the bankruptcy context because of the constitutional requirement for "uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const., Art. I, § 8. "The constitutional requirement of uniformity is a requirement of geographic uniformity." *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 172 (1946) (Frankfurter, J., concurring). If the Eleventh Amendment protects state immunity in some circuits and not in others, the Bankruptcy Code will no longer be geographically uniform, and clear constitutional intent will be frustrated.

The Court should grant certiorari to resolve the conflict among the circuits about Congress's power to abrogate Eleventh Amendment immunity in the Bankruptcy Code.

II. This Case Squarely Presents the Issue of Congress' Power to Abrogate Eleventh Amendment Immunity in the Bankruptcy Context.

In case after case, the Court has repeatedly affirmed that Congress cannot use its Article I powers to override the States' Eleventh Amendment immunity. "The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." *Seminole Tribe*, 517 U.S. at 72-73. "Congress may not abrogate state sovereign immunity pursuant to its Article I powers, hence the Patent Remedy Act cannot be sustained under either the Commerce Clause or the Patent Clause." *Florida Prepaid*

Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627, 636 (1999). "[I]t is settled doctrine that neither substantive federal law nor attempted congressional abrogation under Article I bars a State from raising a constitutional defense of sovereign immunity in federal court." *Alden v. Maine*, 527 U.S. 706 (1999). "Congress may not, of course, base its abrogation of the States' Eleventh Amendment immunity upon the powers enumerated in Article I." *Board of Trustees v. Garrett*, 531 U.S. 356, 364 (2001). *See also City of Boerne v. Flores*, 521 U.S. 507 (1997); *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997); *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 79 (2000).

Rather, Congress can abrogate the States' Eleventh Amendment immunity only through an exercise of its Fourteenth Amendment powers to "remedy and deter a violation of a constitutional right." *Board of Trustees v. Garrett*, 531 U.S. 356, 365 (2001). *See Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721 (2003); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985); *Seminole Tribe*, 517 U.S. at 59; *City of Boerne*, 521 U.S. at 516-53; *Kimel*, 528 U.S. at 80; *Alden*, 527 U.S. at 756, *Florida Prepaid*, 527 U.S. at 637.

Despite the many recent cases addressing the boundaries of State sovereign immunity, the Court has not had the opportunity to consider that issue in the bankruptcy context. Before last Term, the closest it came was *In the Matter of Merchant's Grain, Inc.*, No. 95-561, a case before the Court on a petition for certiorari from the Seventh Circuit the same year as *Seminole Tribe*. After ruling in *Seminole Tribe*, however, the Court granted the State of Ohio's petition, vacated the decision below and remanded for

consideration in light of *Seminole Tribe*. 517 U.S. 1130. On remand, the sovereign immunity issue was mooted.

Last Term the Court granted certiorari in *Tennessee Student Assistance Corp. v. Hood*, 124 S.Ct. 1905 (2004) (*Hood II*), to resolve the abrogation issue in the bankruptcy context. However, because *Hood II* dealt with the discharge of student-loan debt, the Court resolved the case based on *in rem* jurisdiction, rather than on an analysis of Congress' power to abrogate sovereign immunity in bankruptcy. 124 S.Ct. at 1910-12.

In contrast, this case deals with an *in personam* proceeding, in which the liquidator has sued state entities to recover alleged preferential transfers. Respondent Katz thus "seeks affirmative relief from the [S]tate through a coercive judicial process." *Crow* at *4. The bankruptcy court's jurisdiction is therefore "premised on the persona of the [S]tate, not on the res of the debtor's property." *Id.*

Therefore, the issue for which the Court granted review but could not reach in *Hood II* is squarely presented here, in the context of *in personam* rather than *in rem* jurisdiction. The Court should embrace this opportunity and grant certiorari to resolve the issue left open in *Hood II*.

The need is particularly pressing because, despite overwhelming precedent from this Court and guidance from its sister circuits, the Sixth Circuit decision in *Hood I* adopted an obsolete and discredited theory of sovereign immunity. It held that Congress can abrogate a State's sovereign immunity from suit simply by passing legislation under Article I because the States ceded their sovereign immunity in the plan of the Constitutional Convention. This idea is nothing new—it was the rationale behind the now-defunct plurality opinion in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1

(1988), which this Court expressly overruled in *Seminole Tribe*.

Moreover, the early history of the Constitution and of bankruptcy laws, together with more recent case law, demonstrates that Congress's power to abrogate immunity in bankruptcy court is no more potent than it is with regard to other Article I powers. Indeed, the scope of Congress' bankruptcy powers is, in some ways, more limited than its powers under other Article I provisions. Congress' power under the Commerce Clause, for instance, is so broad that it preempts States from even legislating within its sphere—the so-called "dormant commerce clause" doctrine. In the bankruptcy context, by contrast, States are allowed to pass—and have passed—insolvency laws in the absence of federal bankruptcy coverage. *Sturgis v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819).

Nor, as some courts have suggested, does the constitutional requirement of uniformity provide any greater authority for Congress to abrogate. First, the uniformity requirement is primarily geographic in nature—the laws must be uniform throughout the United States—and therefore does not present difficulties in treatment between States and private persons. *Vanston Bondholders*, 329 U.S. at 172. Second, neither the comprehensiveness of a federal power nor a legitimate desire for uniformity in a scheme of federal law can overcome the States' sovereign immunity. *Federal Maritime Commission v. South Carolina Ports Authority*, 535 U.S. 743, 767 (2002); *Florida Prepaid*, 527 U.S. at 647-48.

Similarly, Congress cannot circumvent the limitations placed on Article III courts by creating Article I bankruptcy courts. *See Federal Maritime Commission*, 535 U.S. at 756-767.

Nor can Congress abrogate state sovereign immunity by attempting to repackage its exercise of Article I bankruptcy power as an exercise of its Fourteenth Amendment power. Congress's authority to legislate, and therefore its ability to abrogate, under the Fourteenth Amendment is limited to situations where it is protecting an individual's constitutional right from State intrusion. *College Savings Bank*, 527 U.S. at 672; *City of Boerne*, 521 U.S. at 516-520. There is, however, no constitutional right to a discharge in bankruptcy. *United States v. Kras*, 409 U.S. 434 (1973). Therefore, even if Congress had purported to rely on its authority under the Fourteenth Amendment in enacting 11 U.S.C. § 106(a)—and it did not—that would still provide no basis for Congress to abrogate State sovereign immunity.

In short, "there is simply no principled basis to distinguish the Bankruptcy Clause from other Article I clauses." *In re Sacred Heart Hospital of Norristown*, 133 F.3d at 243. The Court should grant certiorari and reverse.

III. Resolving This Issue is Necessary to Resolving Other Bankruptcy Issues of Importance to the States.

The *amici* States also urge the Court to grant certiorari in this case because the issue here must be resolved as a necessary predicate to the resolution of other critical and controversial issues regarding the interaction of bankruptcy and sovereign immunity.

For example, the Court held in *Gardner v. New Jersey* that filing a proof of claim waives a State's sovereign immunity in bankruptcy court. 329 U.S. 565 (1947). But the *scope* of a proof-of-claim waiver is still a matter of controversy—does the waiver extend only to the amount of

the proof of claim, or does it allow a positive recovery against the State?

The *amici* States clearly have a strong interest in the proof-of-claim issue. Both planning and litigation decisions aimed at protecting the State's fisc are compromised as long as it is unclear whether a proof of claim puts a State at risk only for the amount of the claim, or for the entire contents of the State's coffers. In addition to the importance of resolving the precise issue presented here, the Court should grant certiorari to pave the way for resolution of other important issues in future cases.

CONCLUSION

For the foregoing reasons, *amici* States of Ohio and 48 other States respectfully request the Court grant the writ of certiorari.

Respectfully submitted,

JIM PETRO
Attorney General of Ohio
DOUGLAS R. COLE
State Solicitor
ELISE W. PORTER*
Assistant Solicitor
**Counsel of Record*
30 East Broad Street, 17th Floor
Columbus, OH 43215-3400
614-466-8980
614-466-5087 fax
Counsel for *Amici* States

(3)

No. 04-885

Supreme Court, U.S.
FILED
MAR 14 2005
OFFICE OF THE CLERK

In The
Supreme Court of the United States

CENTRAL VIRGINIA COMMUNITY COLLEGE,
VIRGINIA MILITARY INSTITUTE,
NEW RIVER COMMUNITY COLLEGE, and
BLUE RIDGE COMMUNITY COLLEGE,

Petitioners,

v.

BERNARD KATZ, Liquidating Supervisor of the
Bankrupt Estate of *In re Wallace's Bookstores, Inc.*,
No. 01-50545 (Bkr. E.D. Ky.),

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

JUDITH WILLIAMS JAGDMANN
Attorney General of Virginia

WILLIAM E. THRO
State Solicitor General
Counsel of Record

CARLA R. COLLINS
ERIC A. GREGORY
Associate State
Solicitors General

March 14, 2005

BRIAN J. GOODMAN
CYNTHIA H. NORWOOD
Assistant Attorneys General

Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-2436
(804) 786-1991 (facsimile)

Counsel for the Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. THE THREE COMMUNITY COLLEGES HAVE NOT WAIVED SOVEREIGN IMMUNITY 2

A. Because a Waiver of Sovereign Immunity May Not Be Extrapolated From One State Agency to Another State Agency, There Is No Waiver by the Three Community Colleges..... 3

B. Because the Waiver Is Limited to the Amount of the Proof of Claim, the Waiver Is Inapplicable to Most of the Claims..... 6

II. THE CONFLICT AMONG THE CIRCUITS HAS WIDENED..... 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Arecibo Community Health v. Puerto Rico,
270 F.3d 17 (1st Cir. 2001) 4

Bezner v. East Jersey State Prison (In re Exact Temp., Inc.),
231 B.R. 566 (Bkr. D. N.J. 1999) 5

College Savings Bank v. Florida Prepaid Post-secondary Ed. Expense Bd.,
527 U.S. 666 (1999) 4, 7

Department of the Army v. Blue Fox, Inc.,
525 U.S. 255 (1999) 4

Florida Dept. of Health and Rehabilitative Servs. v. Florida Nursing Home Assn.,
450 U.S. 147 (1981) (*per curiam*) 4

Gardner v. New Jersey,
329 U.S. 565 (1947) 7

Georgia Higher Education Assistance Corp. v. Crow (In re Crow),
394 F.3d 918 (11th Cir. 2004) 8, 10

Hood v. Tennessee Student Assistance Corp. (In re Hood),
319 F.3d 755 (6th Cir. 2003) (*Hood I*) 1, 3

Jones v. Yorke (In re Friendship Medical Center, Ltd.),
710 F.2d 1297 (7th Cir. 1983) 4, 7

Kennecott Copper Corp. v. State Tax Comm'n,
327 U.S. 573 (1946) 4

Ohio v. Madeline Marie Nursing Homes Nos. 1 & 2,
694 F.2d 449 (6th Cir. 1982) 4, 5, 7

TABLE OF AUTHORITIES – Continued

Page

Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe,
498 U.S. 505 (1991) 6, 7

Ossen v. Department of Social Services (In re Charter Oak Associates),
361 F.3d 760 (2nd Cir.), *cert. denied*,
125 S. Ct. 408 (2004) 4, 5

Sacred Heart Hosp. v. Department of Public Welfare (In re Sacred Heart Hosp. of Norristown),
204 B.R. 132 (E.D. Pa. 1997) 5

Schlossberg v. Maryland (In re Creative Goldsmiths),
119 F.3d 1140 (4th Cir. 1997) 4, 5

Schulmann v. California (In re Lazar),
237 F.3d 967 (9th Cir. 2001) 4

Seminole Tribe v. Florida,
517 U.S. 44 (1996) 9

Sims v. Apfel,
530 U.S. 103 (2000) 3

Smith v. Reeves,
178 U.S. 436 (1900) 4

Tennessee Student Assistance Corp v. Hood,
124 S. Ct. 1905 (2004) (*Hood II*) 1

Unicare Homes, Inc. v. Four Seasons Care Centers, Inc. (In re Four Seasons Care Centers, Inc.),
119 B.R. 681 (Bkr. D. Minn. 1990) 5

United States v. King,
395 U.S. 1 (1969) 4

United States v. Shaw,
309 U.S. 495 (1940) 6, 7

TABLE OF AUTHORITIES – Continued

Page

United States v. United States Fidelity & Guaranty Co., 309 U.S. 506 (1940) 6

William Ross, Inc. v. Biehn Construction, Inc. (In re Ross), 199 B.R. 551 (Bkr. W.D. Pa. 1996) 5

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 8, cl. 4 ..... *passim*

STATUTES

Bankruptcy Act, ch. 575, 52 Stat. 883 (1938) (repealed in 1978 by P.L. 95-598, current version at 11 U.S.C. §§ 101-1330) 7

11 U.S.C. § 106(b) 7

11 U.S.C. § 106(c) 7

OTHER AUTHORITIES

Brief of Ohio and Forty-Eight Other States, *Central Virginia Community College v. Katz* (March 2, 2005) (04-885) 1

Brief of Virginia and Twelve States, *Schaeffer v. Weast* (Jan. 21, 2005) (04-698) 1

Brief of Idaho and Forty-Nine Other States, *Elk Grove Unified Sch. Dist. v. Newdow*, (June 10, 2003) (02-1624) 1

REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Central Virginia Community College, Virginia Military Institute, New River Community College, and Blue Ridge Community College (collectively, "the Virginia Institutions"), by and through their counsel, Virginia Attorney General Judith Williams Jagdmann, submit this Reply Brief in support of their Petition for a Writ of Certiorari.

Nothing in the *Brief in Opposition* calls into question the need for this Court to grant certiorari and resolve the issue of whether Congress may use the Article I Bankruptcy Clause, U.S. Const. art. I, § 8, cl. 4, to abrogate sovereign immunity. Indeed, the Respondent, Bernard Katz, does not seriously contest that: (1) the Circuits are divided on the question presented; (2) the question presented has enormous consequences for the States;[1] and (3) unlike *Tennessee Student Assistance Corp v. Hood*, 124 S. Ct. 1905 (2004) (*Hood II*), this matter cannot be resolved on the basis of *in rem* jurisdiction.

Rather, Katz opposes certiorari by: (1) asserting that sovereign immunity has been waived for all Virginia Institutions; (2) urging this Court to delay resolution of the conflict among the Circuits; and (3) contending that the Sixth Circuit's decisions in this matter and in *Hood v. Tennessee Student Assistance Corp.* (*In re Hood*), 319 F.3d 755 (6th Cir. 2003) (*Hood I*) are correct.

---

[1] Indeed, *every other* State in the Union has joined an amicus brief urging this Court to grant review. *See* Brief of Ohio and Forty-Eight Other States, *Central Virginia Community College v. Katz* (March 2, 2005) (04-885). Although the States routinely file amicus briefs urging this Court to grant certiorari, *see generally* Brief of Virginia and Twelve States, *Schaeffer v. Weast* (Jan. 21, 2005) (04-698), it is *rare* for *all* of the States to support certiorari. Indeed, in recent years, it appears that only one other issue – the constitutionality of the Pledge of Allegiance – has garnered the unanimous support of all fifty States. *See generally*, Brief of Idaho and Forty-Nine Other States, *Elk Grove Unified Sch. Dist. v. Newdow*, (June 10, 2003) (02-1624).

In Reply, the Virginia Institutions make two points. First, regardless of whether Virginia Military Institute ("VMI") has waived sovereign immunity, the other three Petitioners – Central Virginia Community College, New River Community College, and Blue Ridge Community College (collectively the "Community Colleges") – have not waived sovereign immunity. Second, since the Petition was finalized, the conflict among the Circuits has widened.

I. THE THREE COMMUNITY COLLEGES HAVE NOT WAIVED SOVEREIGN IMMUNITY.

As explained in the Petition, there is some question as to whether *one* of the Petitioners – VMI – waived sovereign immunity. *See Pet.* at 6 n.9. A VMI employee, who had no authority to waive sovereign immunity, filed a proof of claim on behalf of VMI. However, no proof of claim was filed for the other *three* Petitioners – the Community Colleges. Because these *three* Community Colleges did not file proofs of claim, there should be no argument that sovereign immunity was waived for *all* Petitioners.

Nevertheless, Katz argues that the filing of a proof of claim on behalf of VMI "operated as a waiver of Virginia's sovereign immunity, thereby constituting a waiver on behalf of Virginia's other state agencies." *Resp'ts Br. in Opp'n* at 4. In other words, Katz asserts that if *one* state agency waives sovereign immunity, *all* state agencies waive sovereign immunity. The waiver of one agency is extrapolated to the other agency.

Moreover, although the VMI proof of claim was for $43,247.60, Katz claims that sovereign immunity is waived for claims totaling $408,233.79. Of this total, only $108,063.00 concerns VMI. The remaining $300,170.79 involves the three Community Colleges. In other words, Katz contends that the waiver has been expanded well beyond the proof of claim.

Quite simply, Katz' waiver argument does not preclude the granting of certiorari.[2] First, because a waiver of sovereign immunity may not be extrapolated from one state agency to another state agency, there is no waiver. To say otherwise is to ignore this Court's principles for construing waivers of sovereign immunity and the weight of lower court authority on the scope of waivers that result from the filing of a proof of claim. Second, because the waiver is limited to the amount of the proof of claim, the waiver is inapplicable to most of the claims. To say otherwise is to ignore this Court's jurisprudence on waivers that result from the sovereign's initiation of suit.

A. Because a Waiver of Sovereign Immunity May Not Be Extrapolated From One State Agency to Another State Agency, There Is No Waiver by the Three Community Colleges.

Even if VMI has waived sovereign immunity, that waiver cannot be extrapolated to other state agencies and institutions. This is so for two reasons.

First, Katz' extrapolation of waiver theory is contrary to this Court's principles for construing waivers of sovereign immunity. "[A] waiver of sovereign immunity is to be strictly construed, in terms of its scope, in favor of the

---

[2] Furthermore, Katz never raised this argument in the court of appeals, in the district court on the bankruptcy appeal, or in the bankruptcy court. Although Katz consistently argued that VMI had waived sovereign immunity, *see App.* at 7-8 (Bankruptcy court holds that VMI had waived sovereign immunity); *App.* at 4 (District court declines to address whether VMI has waived), he never suggested that VMI's purported waiver applied to the Community Colleges. Generally, this Court will not consider contentions that were neither pressed nor passed upon in the lower courts. *See Sims v. Apfel*, 530 U.S. 103, 108-09 (2000). Thus, having failed to raise the issue of waiver for the Community Colleges in the lower courts, Katz may not raise the issue now. *See Hood I*, 319 F.3d at 760-61 (refusing to consider a waiver argument that had not been made in the bankruptcy court or before the bankruptcy appellate panel).

sovereign." *Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999). Indeed, waivers of sovereign immunity may not be implied. *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 682 (1999) *See also United States v. King*, 395 U.S. 1, 4 (1969) (describing the "settled propositio[n]" that the United States' waiver of sovereign immunity "cannot be implied but must be unequivocally expressed.") Thus, a State does not consent to suit in federal court by merely consenting to suit in the courts of its own creation. *Smith v. Reeves*, 178 U.S. 436, 441-45 (1900). Nor does it consent to suit in federal court by merely stating its intention to "sue and be sued," *Florida Dept. of Health and Rehabilitative Servs. v. Florida Nursing Home Assn.*, 450 U.S. 147, 149-50 (1981) (*per curiam*), or even by authorizing suits against it "in any court of competent jurisdiction." *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 577-79 (1946). In light of these principles, a waiver of sovereign immunity on behalf of one agency for particular claims cannot be extrapolated to a *different* agency for *different* claims. The proof of claim filed on behalf of VMI was limited to VMI and a specific transaction. Any waiver that resulted from that action cannot be applied to a different institution – the three Community Colleges. Nor can it be applied to a different transaction – the Community Colleges' business dealings with the bankrupt entity.

Second, Katz' extrapolation of waiver theory is contrary to the weight of lower court authority on the scope of waivers that result from the filing of a proof of claim in bankruptcy. When a state agency files a proof of claim in bankruptcy, any resulting waiver is limited to claims that arise out of the same transaction or occurrence. *See Arecibo Community Health v. Puerto Rico*, 270 F.3d 17, 28 (1st Cir. 2001); *Schulmann v. California* (*In re Lazar*), 237 F.3d 967, 978 (9th Cir. 2001); *Schlossberg v. Maryland* (*In re Creative Goldsmiths*), 119 F.3d 1140, 1149 (4th Cir. 1997); *Jones v. Yorke* (*In re Friendship Medical Center, Ltd.*), 710 F.2d 1297, 1301 (7th Cir. 1983); *Ohio v. Madeline Marie Nursing Homes Nos. 1 & 2*, 694 F.2d 449, 462 (6th Cir. 1982). *But see Ossen v. Department of Social*

Services (*In re Charter Oak Associates*), 361 F.3d 760, 768-72 (2nd Cir.), *cert. denied*, 125 S. Ct. 408 (2004). In other words, the waiver of sovereign immunity does not extend to claims involving *different* transactions. *See Schlossberg*, 119 F.3d at 1149; *Jones*, 710 F.2d at 1301; *Madeline Marie*, 694 F.2d at 462. *But see Ossen*, 361 F.3d at 768-69. Nor does one state agency's waiver of sovereign immunity extend to claims involving *different* agencies. *See Sacred Heart Hosp. v. Department of Public Welfare* (*In re Sacred Heart Hosp. of Norristown*), 204 B.R. 132, 142 (E.D. Pa. 1997); *William Ross, Inc. v. Biehn Construction, Inc.* (*In re Ross*), 199 B.R. 551, 556 (Bkr. W.D. Pa. 1996); *Bezner v. East Jersey State Prison* (*In re Exact Temp., Inc.*), 231 B.R. 566, 571 (Bkr. D. N.J. 1999); *Unicare Homes, Inc. v. Four Seasons Care Centers, Inc.* (*In re Four Seasons Care Centers, Inc.*), 119 B.R. 681, 683-84 (Bkr. D. Minn. 1990) (All holding that filing of a proof of claim by one state agency does not waive the sovereign immunity of another state agency). *But see Ossen*, 361 F.3d at 772 (Holding that, at least where state agencies act as a unitary creditor, the filing of a proof of claim by one agency waives the sovereign immunity of the other agencies).

In the present matter, it is undisputed that the transaction or occurrence involving the claims against VMI is separate and distinct from the transactions or occurrences involving the three Community Colleges. Indeed, Katz recognized this fact when he chose to file *separate* adversary proceedings against VMI and each of the three Community Colleges. *See Resp'ts Br. in Opp'n* at 1 (discussing multiple proceedings and multiple complaints). *See also App.* at 5 (denying sovereign immunity to Central Virginia Community College), 7 (denying sovereign immunity to Virginia Military Institute), 9 (denying sovereign immunity to New River Community College), and 11 (denying sovereign immunity to Blue Ridge Community College).[3] Because the claims against the Community College arise

[3] The four complaints were consolidated during the bankruptcy appellate proceedings in the district court.

out of separate transactions and occurrences, VMI's purported waiver of sovereign immunity does not extend to the Community Colleges.

In sum, VMI's purported waiver of sovereign immunity is inapplicable to the Community Colleges. To say otherwise is to ignore this Court's principles for construing waivers of sovereign immunity and the weight of lower court authority on the scope of waivers that result from the filing of a proof of claim. Thus, regardless of whether VMI waived sovereign immunity, it is clear that the three Community Colleges have not. Consequently, there is no waiver to prevent this Court from resolving the question of whether Congress may use the Article I Bankruptcy Clause to abrogate sovereign immunity. Certiorari should be granted.

B. Because the Waiver Is Limited to the Amount of the Proof of Claim, the Waiver Is Inapplicable to Most of the Claims.

Even if VMI has waived sovereign immunity and even if that waiver can be extrapolated to the three Community Colleges, the waiver is inapplicable to claims that *exceed the amount of the proof of claim*. Because Katz' claims against the Virginia Institutions far exceed the amount of the proof of claim, the waiver is inapplicable to the vast majority of Katz' claims.

Under this Court's well-established constitutional jurisprudence, any waiver of sovereign immunity from the invocation of federal jurisdiction is limited to allowing a remedial order to the other party that does not exceed in amount or differ in kind from that sought by the sovereign. *See Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe*, 498 U.S. 505, 509 (1991); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 511-12 (1940); *United States v. Shaw*, 309 U.S. 495, 501-02 (1940). Thus, where the sovereign initiates a suit for injunctive relief, a counter-claim or cross-claim for damages is barred. *Potawatomi Tribe*, 498 U.S. at 509; *United States Fidelity & Guaranty Co.*, 309 U.S. at 513. In other

words, the filing of a claim did not create a broad waiver, *see Potawatomi Tribe*, 498 U.S. at 509. Rather, the filing of a claim merely allows the adjudication of *that* claim. *See Gardner v. New Jersey*, 329 U.S. 565, 574 (1947). Consequently, where a sovereign brings an action for damages, any counterclaim seeking an amount of damages greater than the amount originally sought by the sovereign, even with respect to a mandatory counter-claim, is barred by sovereign immunity. *Shaw*, 309 U.S. at 501. Therefore, if a state agency files a proof of claim in bankruptcy, any resulting waiver logically is limited to the amount of the proof of claim.

Indeed, two Circuits interpreting the Bankruptcy Act, the predecessor to the current Bankruptcy Code, held that a waiver resulting from a proof of claim was limited to the amount of the proof of claim.[4] *See Jones*, 710 F.2d at 1301; *Madeline Marie Nursing Homes*, 694 F.2d at 462. Although the enactment of § 106(c) of the current Bankruptcy Code purported to redefine and expand the scope of the waiver that results from the filing of a proof of a claim, this Court's decision in *College Savings Bank* casts serious doubt on the ability of Congress to redefine the scope of the waiver. *See College Savings Bank*, 527 U.S. at 685-87. However, regardless of whether § 106(c) is constitutional, most of Katz' claims are barred by sovereign immunity.

Quite simply, in bringing four separate cases against VMI and the three Community Colleges, Katz seeks amounts that are greater than the amount of the proof of claim. The proof of claim filed on behalf of VMI was for $43,237.60. However, Katz is seeking a total of $408,233.79 from the Virginia Institutions ($30,409.00 in

---

[4] Section 106(c) allows for "setoff" up to the amount of the State's claim for unrelated counterclaims. While Section 106(b) purportedly allows for affirmative recovery for mandatory counterclaims, it is clear that the claims of the various Virginia Institutions, based on separate contracts, negotiated separately, with separate terms, and ordering separate items, at separate times, with separate payments, cannot possibly be viewed as all being part of the "same transaction or occurrence."

receivables and $77,654.00 in preferential transfers from VMI; $4,898.00 in receivables and $63,387.00 in preferential transfers from Central Virginia Community College; $97,249.61 in receivables and $65,264.00 in preferential transfers from New River Community College; $35,317.60 in receivables and $34,054.58 in preferential transfers from Blue Ridge Community College). While there may be a waiver for the first $43,237.60, there is no waiver of sovereign immunity for the remaining $364,996.19.[5] The only way for Katz to overcome sovereign immunity for the remaining $364,996.19 is if sovereign immunity has been abrogated.

In sum, even if VMI has waived sovereign immunity and even if that waiver extends to the three Community Colleges, the waiver is inapplicable to $364,996.19 of Katz' claims. Because the purported waiver is inapplicable to the vast majority of Katz' claims, the waiver does not constitute a barrier to this Court considering the abrogation issue. Certiorari should be granted.

II. THE CONFLICT AMONG THE CIRCUITS HAS WIDENED.

Since this Petition was finalized, the conflict among the Circuits has widened.[6] The Eleventh Circuit, in *Georgia Higher Education Assistance Corp. v. Crow* (*In re Crow*), 394 F.3d 918 (11th Cir. 2004), joined the Third, Fourth, Fifth, Seventh, and Ninth Circuits in holding that Congress many not use the Article I Bankruptcy Clause to abrogate sovereign immunity. *Crow*, 394 F.3d at 921-22.[7]

[5] Indeed, Katz' claims against VMI alone total $108,063.00. Thus, $64,825.40 of his claims against VMI is barred by sovereign immunity.

[6] Although this Petition was not filed until December 29, 2004, it was finalized with the outside printing company on the morning of December 23, 2004. The Eleventh Circuit rendered its decision on the afternoon of December 23.

[7] The Eleventh Circuit also rejected the notion that Congress' attempt to abrogate sovereign immunity was a valid exercise of Congress' power to enforce the Fourteenth Amendment. *See Id.* at 922-24.

Thus, *six* Circuits have found that sovereign immunity bars an adversary proceeding in bankruptcy and *one* Circuit – the court below – has found that sovereign immunity is no bar.

In concluding that sovereign immunity has not been abrogated, the Eleventh Circuit employed an analysis that is remarkably similar to that employed by the majority of the Circuits to address the issue. Not surprisingly, the Eleventh Circuit analysis is diametrically opposed to the analysis utilized by the court below. In explaining why the Article I Bankruptcy Clause could not be used to abrogate sovereign immunity, the Eleventh Circuit observed:

> in *Seminole Tribe* [*v. Florida*, 517 U.S. 44 (1996)] the Supreme Court held that Congress may not abrogate state sovereign immunity by legislation passed pursuant to its Article I powers.
>
> The Crows read *Seminole Tribe* narrowly, and would restrict the reach of the decision to the Article I powers that were involved in *Seminole Tribe* itself, which are the ones flowing from the Indian and Interstate Commerce Clauses. Under the Crows' theory those powers are positively less potent for present purposes than Congress' Bankruptcy Clause power, because those other powers do not stem from a source that contains a uniformity requirement as the Bankruptcy Clause does. That theory, however, runs counter to the Supreme Court's sharp statement in *Seminole Tribe* that "[t]he Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." The Court did not qualify its emphatic statement that Article I cannot be used to get around the Eleventh Amendment, and we decline to do so here, because the Supreme Court has reiterated in a number of cases since then that "*Seminole Tribe* makes clear that Congress may not abrogate state sovereign immunity pursuant to its Article I powers."

Crow, 394 F.3d at 922 (citations omitted). Moreover, unlike the Third, Fourth, Fifth, Seventh, and Ninth Circuits, the Eleventh Circuit reached this decision fully aware of the Sixth Circuit's decisions in *Hood I* and this case. *See Crow,* 394 F.3d at 921 ("For reasons we will explain, today we join five of the six circuits that have considered the issue in holding that [the] purported abrogation of Eleventh Amendment immunity in bankruptcy proceedings, which is clear and specific, is nonetheless invalid in light of the Supreme Court's decision in *Seminole Tribe.*") (citation omitted). Yet, the Eleventh Circuit chose not to adopt the Sixth Circuit's flawed analysis.

The fact that the conflict among the Circuits has widened in recent weeks illustrates both the recurring nature of the issue and the need for this Court to provide definitive guidance. Resolution of the issue should not be postponed while the few Circuits that have not addressed the issue choose between the approach of six Circuits and the unique approach of the court below. Certiorari should be granted.

CONCLUSION

For the reasons stated in the Petition and above, the Petition for a Writ of Certiorari should be **GRANTED**.

Respectfully submitted,

JUDITH WILLIAMS JAGDMANN
Attorney General of Virginia

WILLIAM E. THRO
State Solicitor General
Counsel of Record

CARLA R. COLLINS
ERIC A. GREGORY
Associate State
Solicitors General

March 14, 2005

BRIAN J. GOODMAN
CYNTHIA H. NORWOOD
Assistant Attorneys General

Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-2436
(804) 786-1991 (facsimile)

Counsel for the Petitioners

(6)

No. 04-885

Supreme Court, U.S.
FILED
JUN 17 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CENTRAL VIRGINIA COMMUNITY COLLEGE, VIRGINIA MILITARY INSTITUTE, NEW RIVER COMMUNITY COLLEGE, AND BLUE RIDGE COMMUNITY COLLEGE,
Petitioners,

v.

BERNARD KATZ, LIQUIDATING SUPERVISOR FOR WALLACE'S BOOKSTORES, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF OF THE AMERICAN ASSOCIATION OF STATE COLLEGES AND UNIVERSITIES, AMERICAN ASSOCIATION OF COMMUNITY COLLEGES, AMERICAN COUNCIL ON EDUCATION AND NATIONAL ASSOCIATION OF STATE UNIVERSITIES AND LAND-GRANT COLLEGES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

C. RANDALL NUCKOLLS
LAWRENCE S. EBNER
MCKENNA LONG & ALDRIDGE LLP
1900 K Street, NW
Washington, DC 20006
(202) 496-7500

ROBERT A. BARTLETT
Counsel of Record
MCKENNA LONG & ALDRIDGE LLP
303 Peachtree Street, NE
Atlanta, Ga 30308
(404) 527-4000

Attorneys for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES..... iii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT.....4

ARGUMENT 7

I. STATE HIGHER EDUCATION INSTITUTIONS ARE ENTITLED TO, AND NEED, SOVEREIGN IMMUNITY PROTECTION TO PERFORM THEIR CORE GOVERNMENTAL FUNCTION OF PROVIDING QUALITY, AFFORDABLE PUBLIC EDUCATION TO THEIR STUDENTS.....7

A. State Higher Education Institutions are Entitled to Sovereign Immunity Protection.....7

B. Dynamic Changes Have Required State Higher Education Institutions to Increase Their Revenue Generating Activities and Engagement with the Private Sector 11

1. Changes in the Funding of State Higher Education Institutions.....12

2. Changes in the Structure of the Economy 15

3. Changes in the Needs of Their Core Constituency (*i.e.*, Existing and Potential Students).....16

4. Changes in Business Practices 17

II. ABROGATING SOVEREIGN IMMUNITY WOULD SUBSTANTIALLY HAMPER STATE HIGHER EDUCATION INSTITUTIONS IN PROVIDING QUALITY, AFFORDABLE PUBLIC EDUCATION, WOULD BE INCONSISTENT WITH THIS COURT'S PRIOR DECISIONS, AND IS NOT NECESSARY TO PROTECT ANY CONSTITUTIONAL OR OTHER RIGHTS OF BANKRUPTCY DEBTORS OR TRUSTEES.....20

A. Abrogating Sovereign Immunity to Require State Higher Education Institutions to Adjudicate Claims in Bankruptcy Court Causes Them Harm and is Not Necessary.....21

B. There are no Bankruptcy Rights, Constitutional or Otherwise, to Justify Abrogating the Sovereign Immunity of State Higher Education Institutions.....23

C. Article I of the U.S. Constitution Does Not Authorize Congress to Abrogate State Sovereign Immunity in Bankruptcy Cases 26

CONCLUSION 30

TABLE OF AUTHORITIES

PAGE

Cases

Abington School District v. Schempp, 374 U.S. 203 (1963) 8
Alden v. Maine, 527 U.S. 706 (1999) 27
Ambach v. Norwick, 441 U.S. 68 (1979) 4, 8
Board of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001).....27
Buchwald v. Univ. of N.M. Sch. of Med., 159 F.3d 487 (10th Cir. 1998).....10
City of Boerne v. Flores, 521 U.S. 507 (1997).....27
Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd, 527 U.S. 666 (1999)..... 10, 11, 27, 28
DeBauche v. Virginia Commonwealth Univ., 7 F. Supp. 2d 718 (E.D. Va. 1998) 9
Estate of Ritter by Ritter v. University of Michigan, 851 F.2d 846 (6th Cir. 1988).....10
Ex Parte New York, 256 U.S. 490 (1921) 11
Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999).....27, 28
Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989).....24
Hadley v. North Arkansas Comm. Tech. College, 76 F.3d 1437 (8th Cir. 1996).....10
Hall v. Med. Coll. of Ohio at Toledo, 742 F.2d 299 (6th Cir. 1984) 10
Hans v. Louisiana, 134 U.S. 1 (1890) 11
Harden v. Adams, 760 F.2d 1158 (11th Cir. 1985) 10
Hoffman v. Connecticut Dept. of Income Maintenance, 492 U.S. 96 (1989).....26, 27
Hutsell v. Sayre, 5 F.3d 996 (6th Cir. 1993) 10
Idaho v. Coeur d'Alene Tribe, 521 U.S. 607 (1997).....27

Jagnandan v. Giles, 538 F.2d 1166 (5th Cir. 1976) 10
Kashani v. Purdue Univ., 813 F.2d 843 (7th Cir. 1987).....10
Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000).....27
Meyer v. Nebraska, 262 U.S. 390 (1923)..... 7
Mitchell v. Los Angeles Comm. College Dist., 861 F.2d 198 (9th Cir. 1988).....10
Power v. Summers, 226 F.3d 815 (7th Cir. 2000) 10
Ranyard v. Board of Regents, 708 F.2d 1235 (7th Cir. 1983) 10
Regents of the University of California v. Doe, 519 U.S. 425 (1997)..... 8
Richardson v. So. Univ., 118 F.3d 450 (5th Cir. 1997) 10
Rutledge v. Arizona Bd. of Regents, 660 F.2d 1345 (9th Cir. 1981), *aff'd sub nom. Kush v. Rutledge*, 460 U.S. 719 (1983).....10
Schoenthal v. Irving Trust Co., 287 U.S. 92 (1932).....24
Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).....8, 27, 28
Tennessee Student Assistance Corp. v. Hood, 541 U.S. 440 (2004) 25, 28, 29
U.S. v. Kras, 409 U.S. 434 (1973).....23
U.S. v. Nordic Village, 503 U.S. 30 (1992).....25
Union Bank v. Wolas, 502 U.S. 151 (1991).....25, 26
United Carolina Bank v. Board of Regents of Stephen F. Austin State Univ., 665 F.2d 553 (5th Cir. Unit A 1982).....10
United States v. Virginia, 518 U.S. 515 (1996)..... 9
Watson v. Univ. of Utah Med. Ctr., 75 F.3d 569 (10th Cir. 1996) 10
Wisconsin v. Yoder, 406 U.S. 205 (1972) 8

Statutes and Regulations

11 U.S.C. § 106(c) 26
11 U.S.C. § 547 .....11, 25

28 U.S.C. § 1408 21
28 U.S.C. § 1409(a) 21
VA. CODE ANN. § 2.2-507 21
VA. CODE ANN. § 2.2-814.A.....22
VA. CODE ANN. § 2.2-815.A.....22
VA. CODE ANN. § 23-9, 23-14, 23-92, 23-215, 23-216, 23.218..... 9
VA.CODE ANN. § 2.2-1802 9
VA. CODE ANN. § 8.01-192, *et seq*..... 23

Miscellaneous

Comments of George R. Boggs, President and EO, American Association of Community Colleges, *available at* http://www.collegeboard.com/press/cost04/trends.html.....14
Correcting Course, How Can We Restore the Ideals of Public Higher Education in a Market-Driven Era, The Futures Project: Policy for Higher Education in a Changing World, *available at* http://www.futuresproject.org/publications/Correcting_Course.pdf.....13, 14
Joint Local Rules of Civil Practice for the United States District Courts for the Eastern and Western Districts of Kentucky, LR 83.2, 83.4, *available at* http://www.kyed.uscourts.gov/rules/Civil_Rules-2.pdf 22
Local Court Rules for the United States District Court for the Northern District of Georgia, LR 83.1.B(2), *available at* http://www.gand.uscourts.gov/localrules.htm..... 22

Lum, Sharlene K.S., Brian Moyer and Robert Yuskavage. *Improved Estimates of Gross Product by Industry for 1947-98.* Survey of Current Business (U.S. Department of Commerce, Bureau of Economic Analysis), June 2000: 29, *available at* http://www.bea.gov/bea/articles/national/niparel/2000/0600gpi.pdf 15

Norris, Donald M. & Mark A. Olson, *The Business Value Web – Resourcing Business Processes And Solutions In Higher Education*, 2003, National Association of College and University Business Officers, *available at* http://www.nacubonet.org/eweb/thumbs/NC3045.gif 18, 19

Returning to Our Roots, Executive Summaries of the Reports of the Kellogg Commission on the Future of State and Land-Grant Universities, NUSALGC, *available at* http://www.nasulgc.org/-publications/Kellogg/Kellogg2000_RetRoots_execsum.pdf) 16

State Fiscal Conditions and Higher Education Funding: Improvement Now, Trouble Ahead, AASCU, Vol. 1, No. 2, August 2004, *available at* http://www.aascu.org/pdf/05_pm1_6.pdf 16

Trends in College Pricing 2004, College Board, *available at* http://www.collegeboard.com/prod_downloads/press/-cost04/041264TrendsPricing2004_FINAL.pdf 12

2003 State Issues Digest, AASCU, *available at* http://www.aascu.org/pdf/03_SID.pdf 12

2004 State Issues Digest, AASCU, *available at* http://www.aascu.org/pdf/04_SID.pdf 12

2004-2005 Student Charges and Financial Aid, AASCU – NASULGC, *available at* http://www.nasulgc.org/publications/-05studchrg.jpg 13

U.S. Department of Commerce, Bureau of the Census. Annual Survey of Government, March 2003 (data accessed from http://ftp2.census.gov/govs/apes/-03stus.txt 20

U.S. CONST. ART. I, § 8, cl. 4 ..... 1, 29

INTEREST OF THE *AMICI CURIAE*[1]

There are nearly 1,700 state-supported and controlled public colleges, universities, and systems of higher education throughout the United States and its territories (the "State Colleges and Universities"), including approximately 1,000 public associate degree-granting community colleges ("Community Colleges") (collectively called "State Higher Education Institutions").

Amici curiae are non-profit organizations whose members comprise the vast majority of State Higher Education Institutions. Their members collectively enroll three-quarters of the students in American higher education (12.3 million of 16.3 million), including approximately 90% of all students attending Community Colleges (10 million of 11.1 million).

Amici curiae have a substantial interest in the issue presented by this case — whether Congress can use the Article I Bankruptcy Clause (U.S. CONST. ART. I, § 8, cl. 4) to abrogate the sovereign immunity of State Higher Education Institutions — because an affirmative answer to that question would have a significant deleterious impact upon the ability of State Higher Education Institutions to perform their core governmental function of providing quality, affordable public education to their students.

Due to the confluence of what has been described as a "perfect storm" of factors, including a substantial reduction in State funding, ongoing demands of other constituencies

---

[1] The parties' letters consenting to the filing of *amicus curiae* briefs have been lodged with the Clerk. Pursuant to Sup. Ct. R. 37.6, *amici curiae* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

competing for scarce State funds, expanding and shifting needs of their own core constituency (*i.e.*, existing and prospective students), and changes in business practices, State Higher Education Institutions have been required to diversify and expand their revenue streams beyond the funds provided directly to them by their States. As a result, State Higher Education Institutions are required to deal with more and more third-party commercial vendors and service providers, many of which have national client bases and principal places of businesses or states of incorporation far removed from a given State Higher Education Institution.

A ruling from this Court abrogating the sovereign immunity of State Higher Education Institutions to non-consensual litigation in federal (bankruptcy) courts would, contrary to the consistent jurisprudence of this Court on the issue of sovereign immunity, subject State Higher Education Institutions to litigation in venues potentially far removed from their home States. Such a ruling would expose State Higher Education Institutions to monetary judgments imposing economic burdens on them, and their States, inconsistent with, and inimical to, their duties and responsibilities as State-funded and controlled institutions which use their finite and limited resources to provide quality, affordable public education to their students. Moreover, such a ruling would threaten intrusions upon state sovereign immunity put to rest by this Court's prior decisions, and is not necessary to protect any rights, constitutional or otherwise, of bankruptcy debtors or trustees.

Amicus curiae **American Association of State Colleges and Universities** ("AASCU") is a non-profit organization whose members include more than 430 State Colleges and Universities and university systems throughout the United States and its territories, which are among the most affordable of all four-year colleges and universities, and whose membership is open to any regionally accredited

institution offering programs leading to bachelor's, master's, or doctoral degrees. AASCU institutions enrolled over 3.7 million students in Fall 2003 — 56% of enrollment at all public four-year institutions.

Amicus curiae **American Association of Community Colleges** ("AACC") is a non-profit organization formed in 1920 whose members include more than 1,100 of the nation's Community Colleges, which marked their 100th year of service to the nation in 2001. There are a total of 1,157 Community Colleges in the U.S., including 979 public, 148 private and 30 tribal, which, collectively, have approximately 11.6 million students enrolled (6.6 million for credit and 5 million non-credit). Students at community colleges comprise approximately 46% of all U.S. undergraduates (approximately 45% of first-time freshmen).

Amicus curiae **American Council on Education** ("ACE"), founded in 1918, represents all higher education sectors. Its approximately 1,800 members include a substantial majority of United States colleges and universities. Additionally, ACE serves as the major coordinating body for all of the nation's higher education institutions.

Amicus curiae **National Association of State Universities and Land-Grant Colleges** ("NASULGC"), founded in 1887, is the nation's oldest higher education association. A voluntary association of 214 institutions, including 76 land-grant universities, of which 17 are the historically black public institutions, 31 tribal colleges that became land-grant institutions in 1994 and are represented through the membership of the American Indian Higher Education Consortium ("AIHEC"), and 27 other public higher education systems. NASULGC member campuses are located in all 50 states, the U.S. territories and the District of Columbia. NASULGC members award about three quarters of a million degrees annually, including 39%

of the baccalaureate, 33% of the master's, 56.5% of the doctoral, and 31% of the professional degrees granted annually. NASULGC members also grant 31% of the law and 36% of the medical degrees awarded annually. NASULGC members have educated about half the members of Congress, and nearly half of the CEOs of America's Fortune 100 corporations.

SUMMARY OF ARGUMENT

Petitioners and *amici curiae* are State-created and controlled institutions of higher public education, fulfilling what this Court has acknowledged is "a most fundamental obligation of government to its constituency" (*Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979)) — providing quality, affordable public education to their students.

State Higher Education Institutions have generally been considered instrumentalities or "arms" of their States and thus immune from suit; and petitioners are "arms of the state" of Virginia, entitled to sovereign immunity protection. The fact that petitioners, like most State Higher Education Institutions, do not receive *all* their funding from their State does not adversely affect their entitlement to the State's sovereign immunity protection. Nor is their sovereign immunity adversely affected by their increasing engagement in commercial activities with third-party vendors and service providers as required to continue performing their core governmental function.

The confluence of a number of factors has required State Higher Education Institutions to diversify and expand their revenue streams beyond the funds provided directly to them by their States. For example, substantial reductions in State funding for public higher education have forced State Higher Education Institutions to raise tuitions and fees, cut costs, and seek out alternative revenue sources. Tuition increases

are problematic, because they threaten access to public higher education to the segment of the population most vulnerable to rising costs—the nation's low-income, college-qualified high school graduates.

To slow the pace of tuition and fee increases and meet the needs of an expanding student population and technological changes and advancement toward lifelong and remote-access education, State Higher Education Institutions are becoming increasingly involved with the private sector by, *inter alia*, outsourcing auxiliary enterprises (*e.g.*, food services, bookstores, IT and business services, etc.). As a result, State Higher Education Institutions deal with an expanding base of third-party commercial vendors and service providers, many of which have national client bases and principal places of businesses or states of incorporation far removed from the State Higher Education Institutions. This trend is likely to continue in the future, and, in the face of stagnant or decreasing State funding, commercial activities will provide needed funds and additional resources to assist State Higher Education Institutions in delivering educational services to their students.

If the sovereign immunity of State Higher Education Institutions were to be abrogated, or if they otherwise were required to participate in federal (bankruptcy) litigation, their ability to perform their core function would be adversely affected. As shown by their involvement in this case, petitioners have been exposed to litigation in Kentucky due to the fortuitous circumstance that the bookstore operator with whom they entered into contracts filed its bankruptcy case there. If not protected by sovereign immunity, petitioners and other State Higher Education Institutions could be subjected to litigation in federal (bankruptcy court) in any of the 50 States, and could be forced to shoulder litigation burdens which will not exist if their sovereign immunity remained intact. Procedures under Virginia law

both allow and require contract claimants to file claims with the appropriate Virginia State agency, and provide for a judicial remedy in Virginia State courts if the claim is not resolved administratively — a less expensive and more manageable and certain method of resolving contract claims which honors their sovereign immunity.

There is no constitutional right to a discharge in bankruptcy. Voluntary bankruptcy was not known in this country at the adoption of the Constitution, and during the first 110 years of the Nation's life it was without a federal bankruptcy law except for three short periods aggregating about 15 years.

Neither preference actions nor contract claims are the type of *in rem* proceedings relating to the bankruptcy *res* that would justify requiring arms of a State such as State Higher Education Institutions to appear in federal (bankruptcy) court to participate in such proceedings, either through abrogation of sovereign immunity or otherwise. Suits to recover preferences are quintessentially common law suits more nearly resembling state-law contract claims brought by a bankrupt to augment the bankruptcy estate than proceedings related to the bankruptcy *res*. Moreover, the broad preference exception for "ordinary course" payments confirms that there is no "quintessential," constitutional, or statutory bankruptcy right or policy that would compel or support the abrogation of State sovereign immunity to allow bankruptcy trustees to collect purported preference claims in federal (bankruptcy) court.

Allowing an intrusion upon sovereign immunity pursuant to the Article I Bankruptcy Clause would undermine this Court's prior sovereign immunity jurisprudence, and greatly threaten the abilities of State Higher Education Institutions to increasingly participate in commercial activities as required to provide quality and affordable public education to their students.

Without sovereign immunity protection from involuntary litigation, State Higher Education Institutions will be at increased risk not only in the areas of preference claims and contract actions, but also in areas put to rest by prior decisions of this Court, including patent infringement, copyright infringement and/or unfair competition claims.

ARGUMENT

I. STATE HIGHER EDUCATION INSTITUTIONS ARE ENTITLED TO, AND NEED, SOVEREIGN IMMUNITY PROTECTION TO PERFORM THEIR CORE GOVERNMENTAL FUNCTION OF PROVIDING QUALITY, AFFORDABLE PUBLIC EDUCATION TO THEIR STUDENTS

A. State Higher Education Institutions are Entitled to Sovereign Immunity Protection

Providing facilities and opportunities for the pursuit of higher education is a long recognized core governmental function. In *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923), this Court stated, "[t]he American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted."

> Public education, like the police function, "fulfills a most fundamental obligation of government to its constituency." The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by our decisions[.]

Ambach v. Norwick, 441 U.S. at 76-77 (citations omitted).[2]

State Higher Education Institutions have generally been considered instrumentalities or "arms" of the States in which they are located, and thus entitled to sovereign immunity protection.[3] In *Regents of the University of California v. Doe*, 519 U.S. 425, 429 (1997), this Court stated, "[i]t has long been settled that the reference to actions 'against one of the United States' encompasses not only actions in which a State is actually named as the defendant, but also certain actions against state agents and state instrumentalities." Observing that "the question whether a money judgment against a state instrumentality or official would be enforceable against the State is of considerable importance to any evaluation of the relationship between the State and the entity or individual being sued" (*id.* at 430), this Court concluded that any money judgment obtained on claims asserted by the plaintiff would be a liability of the State, and unanimously determined that the California Board of Regents was an arm of the State entitled to sovereign immunity protection. *Id.* at 431.

---

[2] *See also Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972) (education is necessary to "prepare citizens to participate effectively and intelligently in our open political system"); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring) (public education is a "most vital civic institution for the preservation of a democratic system of government").

[3] In *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996), this Court explained that sovereign immunity transcends the language of the Eleventh Amendment, which simply confirms the presupposition that each State is a sovereign entity in our federal system and not amenable to the suit of an individual without its consent—a concept embodied in this Court's long-standing jurisprudence that federal jurisdiction over suits against unconsenting States "was not contemplated by the Constitution when establishing the judicial power of the United States" (*citing Hans v. Louisiana*, 134 U.S. 1, 15 (1890)).

Petitioners are "arms of the state" of Virginia, entitled to sovereign immunity protection. They are "governmental instrumentalities" whose liabilities are paid from the State treasury. *See DeBauche v. Va. Comm. Univ.*, 7 F. Supp. 2d 718, 722 & n.3, n.4 (E.D. Va. 1998). (As State treasury is a major source of funds for university, any judgment against it will be paid from State treasury, and that circumstance alone qualifies university as an "arm of the state." Moreover, requirement of State law [VA. CODE ANN. § 2.2-1802] that funds received by university from outside sources, except endowment funds and student funds and loans, be deposited into State treasury, is an additional factor qualifying university as an "arm of the state.") *See also United States v. Virginia*, 518 U.S. 515, 520-21 (1996) ("From its establishment in 1839 as one of the Nation's first state military colleges, VMI has remained financially supported by Virginia and 'subject to the control of the [Virginia] General Assembly'") (internal cites omitted).[4]

That petitioners (like most State Higher Education Institutions) do not receive *all* their funding from the State does not adversely affect their entitlement to the State's sovereign immunity protection, particularly where, as here, they are designated as State agencies, controlled by State appointed boards, and required to submit their budgets for approval by the State.[5]

---

[4] *See, e.g.*, the following sections of the Virginia Code, which are part of Virginia's statutory scheme to create State Higher Education Institutions that are State agencies, governed by bodies appointed by State officials, whose budgets are devised and approved by State officials, and paid, at least in part, directly from the State treasury: VA. CODE ANN. § 23-9.3, 23-9.5, 23-9.6.1, 23-9.9 23-14, 23-92, 23-215, 23-216, and 23-218. All other States have statutory schemes for their public institutions of higher learning.

[5] *See, e.g.*, the following cases in which various U.S. Courts of Appeals determined that State Higher Education Institutions were "arms of the

(footnote continued on next page)

The sovereign immunity afforded petitioners and other State Higher Education Institutions is also not adversely affected by their increasing engagement in commercial activities with third-party vendors and service providers as they diversify the revenue streams and services in their continuing quest to provide quality, affordable public education to their students.

In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 684-86 (1999), this Court, observing that "state sovereign immunity, unlike foreign sovereign immunity, is a constitutional doctrine that is meant to be both immutable by Congress and resistant to trends" (*id.* at 686 n.4), and that the "text of the Eleventh Amendment, of course, makes no distinction between commercial and noncommercial state activities" (*id.*), pointed out that state sovereign immunity is no less robust where the State engages in conduct undertaken for profit traditionally performed by private citizens and

---

(footnote continued from previous page)
state" entitled to sovereign immunity protection notwithstanding that only a portion of their funding came directly from the State: *Power v. Summers*, 226 F.3d 815, 818-19 (7th Cir. 2000); *Buchwald v. Univ. of N.M. Sch. of Med.*, 159 F.3d 487, 494 (10th Cir. 1998); *Richardson v. So. Univ.*, 118 F.3d 450, 455-56 (5th Cir. 1997); *Hadley v. N. Ark. Comm. Tech. Coll.*, 76 F.3d 1437, 1441 (8th Cir. 1996); *Watson v. Univ. of Utah Med. Ctr.*, 75 F.3d 569, 575-78 (10th Cir. 1996); *Hutsell v. Sayre*, 5 F.3d 996, 1002 (6th Cir. 1993); *Estate of Ritter by Ritter v. Univ. of Mich.*, 851 F.2d 846, 849 (6th Cir. 1988); *Mitchell v. Los Angeles Comm. Coll. Dist.*, 861 F.2d 198, 201 (9th Cir. 1988); *Kashani v. Purdue Univ.*, 813 F.2d 843, 846 (7th Cir. 1987); *Harden v. Adams*, 760 F.2d 1158, 1164 (11th Cir. 1985); *Hall v. Med. Coll. of Ohio at Toledo*, 742 F.2d 299, 307 (6th Cir. 1984); *Ranyard v. Bd. of Regents*, 708 F.2d 1235, 1239 (7th Cir. 1983); *United Carolina Bank v. Bd. of Regents of Stephen F. Austin State Univ.*, 665 F.2d 553, 559-61 (5th Cir. Unit A 1982); *Rutledge v. Ariz. Bd. of Regents*, 660 F.2d 1345, 1349-50 (9th Cir. 1981), *aff'd sub nom. Kush v. Rutledge*, 460 U.S. 719 (1983); *Jagnandan v. Giles*, 538 F.2d 1166, 1175-76 (5th Cir. 1976).

corporations. This Court also pointed out that those factors had not been considered in prior decisions upholding State's sovereign immunity: (i) against admiralty claims where the State was running a tugboat towing service at "fair and reasonable rates" for profit, that was traditionally performed by private citizens and corporations (*Ex parte New York*, 256 U.S. 490, 501 (1921)), or (ii) against an action to recover coupons on bonds issued by a State, the issuance of which rendered the State "a participant in the financial markets" (*Hans v. Louisiana*, 134 U.S. 1, 16-18 (1890)). 527 U.S. at 684-85.

Respondent, as liquidator of a bankruptcy debtor's estate, has brought separate actions against each of petitioners seeking affirmative recoveries of purportedly preferential transfers received in violation of the bankruptcy preference statute, 11 U.S.C. § 547, and for recovery of asserted damages resulting from the purported breach of each petitioner's respective contract with the bankruptcy debtor.

Since petitioners are "arms of the state" of Virginia whose liabilities will be paid by the State, they are entitled to sovereign immunity protection against the claims asserted by respondent.

B. Dynamic Changes Have Required State Higher Education Institutions to Increase Their Revenue Generating Activities and Engagement with the Private Sector

Seventy-three percent of full-time students and 80% of students overall are in State Higher Education Institutions. Almost half of all full-time undergraduate students attend State Colleges and Universities, and another quarter are enrolled in Community Colleges. Due to the confluence of a number of factors, the most significant of which are described below, in order to continue providing quality, affordable public education to these students, State Higher

Education Institutions have been required to become more and more involved with the private sector, thereby increasing the potential negative impact that would result from an abrogation of their state sovereign immunity.

1. Changes in the Funding of State Higher Education Institutions

There has been a significant decrease in funding provided by States to State Higher Education Institutions, forcing them to increase tuitions, cut costs and search out alternative sources of revenue.

The portion of State Higher Education Institutions' revenues from State government appropriations declined from 50% in 1980 to 36% in 2000.[6] Over the past two fiscal years (FY2003 and FY2004), State funding has dropped $2.5 billion (4%), with 29 states posting losses over this period.[7]

State funding is diminishing because entitlements are consuming an ever-larger percentage of both state and federal budgets. For example, by FY2002, K-12 education, Medicaid, and corrections consumed nearly 60% of State general fund spending, a significant increase over FY1992 levels of nearly 49%.[8] Medicaid funding alone increased by 9.3% for FY2003.[9]

To compensate for the reduction in State funding, State

---

[6] *See Trends in College Pricing 2004*, College Board, p.4, and Figure 12. (*available at* http://www.collegeboard.com/prod_downloads/press/-cost04/041264TrendsPricing2004_FINAL.pdf) (*last visited* June 16, 2005).

[7] *See 2004 State Issues Digest*, AASCU, p. 7, and Figure 4 (*available at* http://www.aascu.org/pdf/04_SID.pdf) (*last visited* June 16, 2005).

[8] *See 2003 State Issues Digest*, AASCU, p. 18, and Figure 10 (*available at* http://www.aascu.org/pdf/03_SID.pdf) (*last visited* June 16, 2005).

[9] *See 2004 State Issues Digest*, at p. 6, and Figure 3.

Higher Education Institutions have been forced to raise tuitions and fees, cut costs, and seek out alternative revenue sources. Between 1980 and 2000, tuition and fees at State Colleges and Universities rose from 13% to 18% of institutional revenues. According to the College Board, tuition and fees have been growing faster than the rate of inflation since the early 1980s. From 1994–1995 to 2004–2005, tuition and fees at public four-year colleges and universities increased 51% ($1,725) in constant (inflation-adjusted) dollars, with the sharpest spike occurring over the past two years; and tuition and fee increases far outpaced inflation again in 2004, rising 10.5% at State Colleges and Universities and 8.7% at Community Colleges.[10]

Raising tuition and fees to offset reduced State funding, although necessary, is problematic for a number of reasons, the most important of which is that it threatens access to higher education by raising economic barriers to attendance to the segment of the population most vulnerable to rising costs—the nation's low-income, college-qualified high school graduates. Financial aid to assist in paying the cost of tuition and fees is becoming less and less available to students from low income families. The trend of the past decade has seen a decrease in grant aid as a proportion of total aid, while loans have increased. In 2003–2004, loans constituted 56% of all postsecondary aid, while grants comprised 38%, and work-study/tax credits accounted for the rest. In 2003–2004, grant aid grew by 8% over 2002–2003, while loan dollars grew by 19%.[11] Today, the

---

[10] *See Correcting Course, How Can We Restore the Ideals of Public Higher Education in a Market-Driven Era*, The Futures Project: Policy for Higher Education in a Changing World, p. 3. (*available at* http://www.futuresproject.org/publications/Correcting_Course.pdf) (*last visited* June 16, 2005).

[11] *See 2004-2005 Student Charges and Financial Aid*, AASCU – NASULGC, p. 9 (*available at* http://www.nasulgc.org/publications/-

(footnote continued on next page)

financial aid system requires low-income students to cover an average of $3,800 in college-related expenses per year at State Higher Education Institutions—a sum that forces many to delay or abandon their studies.[12]

This situation is exacerbated at Community Colleges, because they serve higher percentages of students from low-income families than do other sectors of higher education. The Fall of 2004 marked the third consecutive year of significant increases in tuition and fees largely caused by continuing shortages in state and local funding. Simultaneously, enrollments have been surging, especially in high-demand, high-cost technical programs such as nursing and information technology. Community Colleges already educate more than 60% of nurses and other health-care professionals, and a recent survey shows these programs continue to be the fastest growing, in response to a severe national need.[13]

Due, in part, to the threat to access posed by increasing tuition and fees and the skewed financial aid system, State Higher Education Institutions have been forced to find alternative sources of revenue, including revenues from auxiliary enterprises (*e.g.,* food services; bookstores; IT and business services).

For all State Higher Education Institutions, the future presents an environment that will be characterized by reduced state appropriations, and in which tuition increases

---

(footnote continued from previous page)
05studchrg.jpg) (*last visited* June 16, 2005).

[12] *Correcting Course*, p. 2.

[13] *See* Comments of George R. Boggs, President and CEO, American Association of Community Colleges (*available at* http://www.collegeboard.com/press/cost04/trends.html) (*last visited* June 16, 2005).

and commercial activities will provide needed funds so that they can continue to provide quality, affordable public education to their students.

2. Changes in the Structure of the Economy

Over the past half century, there has been a marked shift in the bulk of U.S. economic activity from goods production to service and information production, which has had a negative impact on State tax revenues available to fund public higher education.

According to the U.S. Department of Commerce, from 1947 to 1998, goods production fell from about 40% of Gross Domestic Product ("GDP") to about 20%, while service production (including knowledge and information services) jumped from about 45% of GDP to about 65%.[14]

Most State tax structures were developed when the economy was far more dependent on goods production than on information or service production. The recent recession and accompanying fiscal slide has made clear that the tax bases of States who have failed to include a broad array of services in their taxes will shrink over time, resulting in structural deficits in State budgets confronted with rising education and health care demands of a society that is simultaneously aging and forced to compete globally. A recent analysis by the Rockefeller Institute revealed that 39 states currently have structural deficits, including some of

---

[14] *See* Lum, Sharlene K.S., Brian Moyer and Robert Yuskavage. *Improved Estimates of Gross Product by Industry for 1947-98.* Survey of Current Business (U.S. Department of Commerce, Bureau of Economic Analysis), June 2000: 29 (*available at* http://www.bea.gov/bea/articles/national/niparel/2000/0600gpi.pdf) (*last visited* June 16, 2005).

the largest and fastest-growing.[15]

This scenario provides yet another compelling reason and need for State Higher Education Institutions to diversify and expand their revenue streams so that they will have the funds needed to perform their core governmental function.

3. Changes in the Needs of Their Core Constituency (*i.e.*, Existing and Potential Students)

Just as the bulk of U.S. economic activity has shifted markedly from goods production to service and information production, there has also been a remarkable shift and growth in demand for education throughout the lifetime of virtually every citizen; and a further demand for institutions of higher education to "reach out" to satisfy this need with the greatest quality and efficiency possible.

The importance and benefits of lifelong learning was emphasized by responses of decision makers in K–12 and higher education to a survey where they strongly agreed that lifelong learning promotes individual well-being, benefits corporate productivity, is important to the country's economic prosperity, and enhances the quality of community life. More than eight in 10 of them also agreed that lifelong learning is important to the security of the nation, is a national priority, and promotes family preservation.[16]

---

[15] *See State Fiscal Conditions and Higher Education Funding: Improvement Now, Trouble Ahead*, AASCU, Vol. 1, No. 2, August 2004, p. 2 (*available at* http://www.aascu.org/pdf/05_pm1_6.pdf) (*last visited* June 16, 2005).

[16] *See Returning to Our Roots, Executive Summaries of the Reports of the Kellogg Commission on the Future of State and Land-Grant Universities*, p. 20, NASULGC (*available at* http://www.nasulgc.org/-publications/Kellogg/Kellogg2000_RetRoots_execsum.pdf) (*last visited* June 16, 2005).

Not only are State Colleges and Universities suitable places for lifelong learning programs, so too are Community Colleges, because they can provide educational opportunities and service to the members of their local communities with minimal geographic and economic barriers.

To satisfy the burgeoning demand for lifelong learning, State Higher Education Institutions must provide a wide variety of teaching and learning opportunities and approaches, ranging from traditional on-campus instruction to internet-based courses. They must also form partnerships with business and professional associations to plan for and meet the educational needs of the workforce on a timely basis through on-campus classroom instruction, on-site instruction in workplaces, and distance learning. They must also embrace emerging information technologies, including new interactive, multimedia technologies, as tools for enriching learning by tailoring instruction to societal, organizational, and individual needs.

Funds are obviously needed to accomplish these ambitious goals and requirements, and in today's environment of shrinking State funding and explosive and dynamic growth and change in the information technology market, State Higher Education Institutions must inevitably engage in commercial activity with third-party vendors, service providers, and businesses whose employees will become the "consumers" of the educational services provided.

4. Changes in Business Practices

Changes in business practices, coupled with the resource constraints brought about by decreased state funding, and the needs to reduce costs and enhance the quality of products, services and experiences for their students, have resulted in State Higher Education Institutions outsourcing a number of auxiliary services that historically were performed by them

"in-house." In addition to saving money, such outsourcing has improved campus efficiency and the quality of services and the educational experience for their students.

A complex array of options are presented to State Higher Education Institutions, including the privatization of auxiliary services such as bookstores, food services, residence halls, buildings and grounds; as well as other auxiliary services, such as IT outsourcing, business process outsourcing, application service providers, expert services, shared services, and process reinvention. Drivers for IT outsourcing, in particular, include pressure on budgets for both capital and operating costs; the shift to web-based technologies; integration of IT technologies into operations functions; scarce IT architectural and engineering staff resources; and various competitive pressures expressed through administrative, academic, education, and research demands. Leading technology companies have elevated their status from "vendors" to "solution providers;" and web services are enabling the seamless integration of loosely coupled services for parts of business processes.

State Higher Education Institutions are dealing with a broad range of outsourcing providers for auxiliary services and processes. They range from large firms offering auxiliary services outsourcing (*e.g.*, Barnes & Noble, Sodhexo, Aramark), to franchise operations (*e.g.*, Burger King, Chick Fil-A, Little Dinos), to local markets and merchants (*e.g.*, flower shops, boutiques, other specialty providers).[17]

---

[17] Donald M. Norris & Mark A. Olson, *The Business Value Web – Resourcing Business Processes And Solutions In Higher Education*, 2003, National Association of College and University Business Officers, p. 5 (*available at* http://www.nacubonet.org/eweb/thumbs/NC3045.gif) (*last visited* June 16, 2005).

According to the National Association of College and University Business Officers ("NACUBO"), as of 2002 over 90% of institutions outsource at least one campus service and almost 80% outsource two or more services, an increase of almost 10% over 2000 levels. Cost savings and improving quality of services were far and away the primary reasons given by institutions for considering outsourcing.[18]

In addition to the direct cost savings and the improved campus efficiency, quality of services and educational experience, State Higher Education Institutions have also discovered that outsourcing auxiliary services and processes has been both an economic driver to the production of jobs in the local community, and improved the quality of the educational experience for their students by further engaging the community in which they are located. Indeed, it is likely that any retrenchment on the part of State Higher Education Institutions as to outsourced auxiliary services and processes would be perceived negatively and met with resistance in their local communities.

The current state of financial exigency confronting State Higher Education Institutions promises to make outsourcing decisions ever more complex and important. Engaging in such outsourcing is a necessary requirement for State Higher Education Institutions seeking cost savings, productivity enhancements, ways of creating genuine synergies that add value for them and their students, and diversified and expanded revenue streams.

---

[18] *Id.* at p. 4.

II. ABROGATING SOVEREIGN IMMUNITY WOULD SUBSTANTIALLY HAMPER STATE HIGHER EDUCATION INSTITUTIONS IN PROVIDING QUALITY, AFFORDABLE PUBLIC EDUCATION, WOULD BE INCONSISTENT WITH THIS COURT'S PRIOR DECISIONS, AND IS NOT NECESSARY TO PROTECT ANY CONSTITUTIONAL OR OTHER RIGHTS OF BANKRUPTCY DEBTORS OR TRUSTEES

State Higher Education Institutions still remain a large component of State governments in terms of State discretionary spending, and the staffs of State Higher Education Institutions comprise a large portion of State workforces.[19] Abrogation of their sovereign immunity, therefore, would have a disproportionately large impact on State Higher Education Institutions.

Due to the confluence of factors discussed above, including State funding constraints, pressures to keep down tuition and fee hikes, and need to cut costs, State Higher Education Institutions must increasingly outsource their ancillary operations, such as dining and residential services, IT services, and, in particular, bookstores—which are the subject of respondent's claims against petitioners in this case.

[19] As of March 2003, higher education comprised 36% of States' full-time workforce and 45% of States' total workforce. *See* U.S. Department of Commerce, Bureau of the Census. Annual Survey of Government, March 2003 (data accessed from http://ftp2.census.gov/govs/apes/-03stus.txt) (*last visited* June 16, 2005).

A. Abrogating Sovereign Immunity to Require State Higher Education Institutions to Adjudicate Claims in Bankruptcy Court Causes Them Harm and is Not Necessary

Petitioners find themselves as defendants in federal (bankruptcy) court outside the borders of their home state due to circumstances over which they had no control—their selection of a now-bankrupt bookstore operator as the entity to which they outsourced the operation of their campus bookstores.

Notwithstanding that petitioners each entered into contracts governed by Virginia law for the performance of services in Virginia, simply because their bookstore operator's principal place of business, state of incorporation, and/or principal assets were located in Kentucky, they have been exposed to litigation in Kentucky where the bankruptcy case was filed. *See* 28 U.S.C. § 1408. Given the permutations of venue for filing bankruptcy cases, as well as adversary proceedings associated with bankruptcy cases, if not protected by sovereign immunity, petitioners and other State Higher Education Institutions could be subjected to litigation in federal (bankruptcy court) in any of the 50 States. *See* 28 U.S.C. § 1409(a).

Moreover, having been subjected to litigation in a bankruptcy court outside the borders of their home State, in addition to having to shoulder the expense and burden of defending themselves through the offices of the Virginia Attorney General, who is charged with providing their defense (*see* VA. CODE ANN. § 2.2-507), petitioners are also required to have their statutorily designated counsel seek permission from the Kentucky federal (bankruptcy) court to appear and represent them; and, depending upon the discretionary determination of that Court, may be required to

retain counsel who is admitted to the bar of that court.[20]

If their sovereign immunity were abrogated, petitioners, in addition to being subjected to litigation in the federal (bankruptcy) court located outside Virginia, would also be required to shoulder litigations burden which would not exist if their sovereign immunity remained intact. As to respondent's contract claims, under Virginia law, a pecuniary claimant is required to file his claim with, *inter alia*, the head of the institution responsible for the alleged act or omission giving rise to the claim. *See* VA. CODE ANN. § 2.2-814.A. Said institution head is then required to forward that claim without unreasonable delay and with appropriate supporting papers and recommendations to the Virginia Comptroller, who is required to promptly allow the amount that appears to be due. *See* VA. CODE ANN. § 2.2-815.A. If respondent had followed such procedure, his claims might have been allowed by Virginia's Comptroller—thereby obviating any need for petitioners to be engaged in litigation whatsoever or to incur any litigation expenses. If the Comptroller had denied respondent's claims, then respondent would have a perfect remedy under Virginia law to bring an action to seek recovery *in Virginia*. *See* VA.

[20] *See* Joint Local Rules of Civil Practice for the United States District Courts for the Eastern and Western Districts of Kentucky, LR 83.2 and 83.4. (*available at* http://www.kyed.uscourts.gov/rules/Civil_Rules-2.pdf) (*last visited* June 16, 2005). This is a practice adhered to in all federal (bankruptcy) courts; and, indeed, many courts require the retention of local counsel as a condition to the admission of out-of-state counsel. *See, e.g.*, LR 83.1.B(2), Local Court Rules for the United States District Court for the Northern District of Georgia (requiring attorney appearing *pro hac vice* to designate local member of bar of court with whom the opposing counsel and court may readily communicate regarding the conduct of the case and upon whom papers shall be served) (*available at* http://www.gand.uscourts.gov/localrules.htm) (*last visited* June 16, 2005).

CODE ANN. § 8.01-192, *et seq.*[21]

In sum, if their sovereign immunity were to be abrogated, State Higher Education Institutions would be required to divert an unknown amount of their scarce resources away from funding educational services to paying costs, expenses, and potential judgments they could face as defendants in federal (bankruptcy) litigation.

B. There are no Bankruptcy Rights, Constitutional or Otherwise, to Justify Abrogating the Sovereign Immunity of State Higher Education Institutions

There is no constitutional right to a discharge in bankruptcy, and neither preference actions nor contract claims rise to the level of *in rem* proceedings that would justify requiring State Higher Education Institutions to appear in federal (bankruptcy) court to participate in such proceedings.

As this Court stated in *United States v. Kras*, 409 U.S. 434, 446-47 (1973):

> There is no constitutional right to obtain a discharge of one's debts in bankruptcy. The Constitution, Art. I, § 8, cl. 4, merely authorizes the Congress to 'establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.' Although the first bankruptcy law in England was enacted in 1542, and a discharge provision first appeared 1705, primarily as a reward for cooperating debtors, voluntary bankruptcy

[21] While presenting a survey of State law on this subject is not within the scope of this brief, *amici curiae* respectfully represent that all other States have judicial and/or administrative processes and procedures in place similar to those of Virginia for dealing with claims arising out of contracts for goods and services with State agencies or instrumentalities.

> was not known in this country at the adoption of the Constitution. Indeed, for the entire period prior to the present Act of 1898, the Nation was without a federal bankruptcy law except for three short periods aggregating about 15 1/2 years. . . . Professor MacLachlan has said that the development of the discharge 'represents an independent . . . public policy in favor of extricating an insolvent debtor from what would otherwise be a financial impasse.' But this obviously is a legislatively created benefit, not a constitutional one, and, as noted, it was a benefit withheld, save for three short periods, during the first 110 years of the Nation's life.

(internal citations omitted). As to preference and contract actions sought to be pursued in bankruptcy proceedings, this Court, in *Schoenthal v. Irving Trust Co.*, 287 U.S. 92, 94-95 (1932), stated:

> In England, long prior to the enactment of our first Judiciary Act, common-law actions of trover and money had and received were resorted to for the recovery of preferential payments by bankrupts. Suits to recover preferences constitute no part of the proceedings in bankruptcy but concern controversies arising out of it.

(citations omitted). Moreover, in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989), this Court, citing to *Schoenthal*, and discussing both fraudulent conveyance and preference actions brought by bankruptcy trustees, described such suits as:

> quintessentially suits at common law that more nearly resemble state-law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy *res*.

Id. at 56. In *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 454 (2004), this Court acknowledged the differences between preference actions and an *in rem* action pertaining to the bankruptcy *res*, stating:

> Clearly dismissal of the complaint is not appropriate as the court has *in rem* jurisdiction over the matter, and the court here has not attempted to adjudicate any claims outside of that jurisdiction. The case before us is thus unlike an adversary proceeding by the bankruptcy trustee seeking to recover property in the hands of the State on the grounds that the transfer was a voidable preference.

See also United States v. Nordic Village, 503 U.S. 30, 38 (1992), in which this Court, in the context of a suit against the federal government to recover a post-bankruptcy transfer of funds by a debtor, stated:

> Respondent sought to recover a sum of money, not "particular dollars," so there was no *res* to which the court's *in rem* jurisdiction could have attached, In any event, we have never applied an *in rem* exception to the sovereign-immunity bar against monetary recovery, and have suggested that no such exception exists.

(internal citations omitted).

Moreover, considering that not all payments made by a debtor prior to bankruptcy are preferences—and, indeed, that payments made in the ordinary course of business in accordance with ordinary business terms are *not* preferences—there is no compelling reason why sovereign immunity protection should be abrogated, or "arms of the state," including State Higher Education Institutions, otherwise required to defend against such actions.

In *Union Bank v. Wolas*, 502 U.S. 151, 153 (1991), this Court, discussing 11 U.S.C. § 547, acknowledged that payments on debts incurred in the ordinary course of

business or financial affairs of the debtor and the transferee, which are made according to ordinary business terms, and in the ordinary course of business, are not preferences. This Court then determined that the "ordinary course" exception applied to long-term as well as short-term debt, since, *inter alia*, excepting both types of payments furthered the policy of deterring creditors from "racing to the courthouse" to dismember the debtor or refusing to continue dealing with the debtor. *Id.* at 162.

The payments which respondent seeks to recover from petitioners were made pursuant to on-going contractual relations between each petitioner and the bankruptcy debtor; therefore, it is quite possible, if not likely, that they were "ordinary course" payments, *not* preferences. Regardless of the ultimate outcome if petitioners were forced to litigate the issue in federal (bankruptcy) court, the critical point to note is that the broad preference exception for "ordinary course" payments confirms there is no "quintessential," constitutional, or statutory bankruptcy right or policy that would compel or support the abrogation of State sovereign immunity to allow bankruptcy trustees to collect purported preference claims from "arms of the state," including State Higher Education Institutions.

C. Article I of the U.S. Constitution Does Not Authorize Congress to Abrogate State Sovereign Immunity in Bankruptcy Cases

In *Hoffman v. Connecticut Department of Income Maintenance*, 492 U.S. 96, 101-02 (1989), in which this Court concluded that Congress had not validly abrogated States' sovereign immunity pursuant to 11 U.S.C. § 106(c), Justice Scalia, concurring, presaged this Court's later rulings as to Congress' lack of authority to use Article I of the U.S. Constitution to abrogate States' sovereign immunity. He stated that:

> it makes no sense to affirm the constitutional principle established by *Hans v. Louisiana*, that "'a suit directly against a State by one of its own citizens is not one to which the judicial power of the United States extends, unless the State itself consents to be sued,'" and to hold at the same time that Congress can override this principle by statute in the exercise of its Article I powers.

Id. at 105 (internal citations omitted). Subsequent to *Hoffman*, this Court has issued a series of opinions which have consistently held that Congress may not use its Article I powers to abrogate States' sovereign immunity.[22] These cases clearly establish that: (i) the powers delegated to Congress under Article I of the United States Constitution do not include the power to abrogate States' sovereign immunity from suit in federal or state courts;[23] and (ii) while States

---

[22] *See, e.g., Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (Indian Commerce Clause—Indian Gaming Regulatory Act); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999) (Commerce Clause and Patent Clause—Patent and Plant Variety Protection Remedy Clarification Act); *Coll. Sav. Bank*, 527 U.S. 666 (1999) (dormant Commerce Clause—Trademark Remedy Clarification Act and Lanham Act); *Alden v. Maine*, 527 U.S. 706 (1999) (Necessary and Proper Clause (and Supremacy Clause)—Fair Labor Standards Act); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (Commerce Clause—Age Discrimination in Employment Act ("ADEA")); *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (Commerce Clause—Americans with Disabilities Act). *See also Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997) (suit against State and State officials by Indian tribe to quiet title barred by sovereign immunity); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (in Religious Freedom Restoration Act of 1993, Congress did not validly abrogate State sovereign immunity pursuant to Fourteenth Amendment, Clause 5).

[23] *See e.g., Seminole Tribe*, 517 U.S. at 73; *Fla. Prepaid*, 527 U.S. at 647-48; *Coll. Sav. Bank*, 527 U.S. at 683-84; *Alden*, 527 U.S. at 732-33; *Kimel*, 528 U.S. at 79-80; and *Garrett*, 531 U.S. at 364.

may waive their sovereign immunity and consent to be sued in federal courts, that consent must be unequivocal, and cannot be inferred from receipt of funds, acquiescence, or engaging in commercial conduct.[24]

While this Court has not specifically addressed the question presented in this case, *i.e.*, whether Congress can use its Article I powers to establish uniform laws on bankruptcy to abrogate States' sovereign immunity from suit in federal courts, in *Seminole Tribe*, this Court also presaged its analysis of this specific issue when, in a footnote addressing comments in the dissent of Justice Stevens, it stated:

> it has not been widely thought that the federal antitrust, bankruptcy, or copyright statutes abrogated the States' sovereign immunity. This Court never has awarded relief against a State under any of those statutory schemes; . . . Although the copyright and bankruptcy laws have existed practically since our Nation's inception, and the antitrust laws have been in force for over a century, there is no established tradition in the lower federal courts of allowing enforcement of those federal statutes against the States.

Seminole Tribe, 517 U.S. at 73, n.16 (internal citations omitted).

In *Tennessee Student Assistance Corp. v. Hood*, this Court held that the undue hardship determination sought by the debtor could be adjudicated by the federal (bankruptcy) court in the exercise of its *in rem* jurisdiction over the bankruptcy *res* (*i.e.*, the debtor and his estate) without affronting State sovereignty (541 U.S. at 441), and therefore,

---

[24] *See e.g.*, *Seminole Tribe*, 517 U.S. at 58-59; *Fla. Prepaid*, 527 U.S. at 635; *Coll. Sav. Bank*, 527 U.S. at 676-85.

that such undue hardship determination was not a suit against the State for sovereign immunity purposes. *Id.* at 451. In clarifying its holding in response to comments in the dissent of Justice Thomas, this Court observed:

> This is not to say, "a bankruptcy court's *in rem* jurisdiction overrides sovereign immunity," . . . but rather that the court's exercise of its *in rem* jurisdiction to discharge a student loan debt is not an affront to the sovereignty of the State. Nor do we hold that every exercise of a bankruptcy court's *in rem* jurisdiction will not offend the sovereignty of the State.

Id. at 451, n.5 (internal citations omitted).

Amici curiae respectfully submit that this Court's prior jurisprudence on sovereign immunity, and the nature and scope of bankruptcy *in rem* jurisdiction, require a determination that Congress may not use the Article I Bankruptcy Clause (U.S. CONST. ART. I, § 8, cl. 4) to abrogate the sovereign immunity of State Higher Education Institutions.

Furthermore, allowing such an intrusion upon sovereign immunity pursuant to Article I would, *amici curiae* respectfully submit, undermine this Court's prior jurisprudence and greatly threaten the abilities of State Higher Education Institutions to increasingly participate in commercial activities as required to provide quality, affordable public education to their students.

Without sovereign immunity protection from involuntary litigation, State Higher Education Institutions will be at increased risk not only in the areas of preference and contract claims discussed herein, but also in areas put to rest by prior decisions of this Court. By way of example, if State sovereign immunity can be abrogated so as to allow non-consensual bankruptcy litigation against "arms of the state," what is to stop a bankrupt debtor or trustee from asserting

patent infringement, copyright infringement, unfair competition, and/or other claims against States or State Higher Education Institutions previously put to rest by this Court's prior decisions?

CONCLUSION

For the foregoing reasons, the question presented should be answered in the negative, and the judgment of the Sixth Circuit Court of Appeals should be reversed.

Respectfully submitted,

RANDALL C. NUCKOLLS
LAWRENCE S. EBNER
MCKENNA LONG & ALDRIDGE LLP
1900 K STREET, NW
WASHINGTON, DC 20006
(202) 496-7500

ROBERT A. BARTLETT
Counsel of Record
MCKENNA LONG & ALDRIDGE LLP
303 PEACHTREE STREET, NE
ATLANTA, GA 30308
(404) 527-4000
Attorneys for Amici Curiae

June, 2005

Supreme Court, U.S.
FILED
JUN 17 2005
OFFICE OF THE CLERK

No. 04-885

IN THE

Supreme Court of the United States

CENTRAL VIRGINIA COMMUNITY COLLEGE, *et al.*,
Petitioners,

v.

BERNARD KATZ,
Liquidating Supervisor for Wallace's Bookstores, Inc.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, U.S. CONFERENCE OF MAYORS, AND INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* SUPPORTING PETITIONERS

RICHARD RUDA*
Chief Counsel
JAMES I. CROWLEY
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 309
Washington, D.C. 20001
(202) 434-4850

* Counsel of Record for the *Amici Curiae*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether the Bankruptcy Clause of Article I grants Congress the power to abrogate the States' sovereign immunity from suits for money damages.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
STATES ARE IMMUNE FROM ADVERSARY PROCEEDINGS IN FEDERAL BANKRUPTCY COURT THAT SEEK MONETARY DAMAGES OR OTHER AFFIRMATIVE RELIEF	5
I. AN ADVERSARY PROCEEDING AGAINST A STATE WHICH SEEKS MONEY DAMAGES IS PROHIBITED BY THE STATE'S SOVEREIGN IMMUNITY	6
A. An Adversary Proceeding Against A State Violates The Core Purposes Of Eleventh Amendment Immunity	6
B. An Adversary Proceeding Which Seeks Payment On Account Or To Avoid A Preferential Transfer Is An *In Personam* Action And Not An *In Rem* Proceeding	11
II. CONGRESS DOES NOT HAVE POWER UNDER THE BANKRUPTCY CLAUSE OF ARTICLE I TO ABROGATE A STATE'S ELEVENTH AMENDMENT IMMUNITY	14
CONCLUSION	25

TABLE OF AUTHORITIES

Cases — Page

Alden v. Maine, 527 U.S. 706 (1999) ..... *passim*
Arecibo Community Health Care, Inc. v. Puerto Rico, 270 F.3d 17 (1st Cir. 2001) 10
In re Ayers, 123 U.S. 443 (1887)..... 7-8, 8
Begier v. IRS, 496 U.S. 53 (1990) 13
Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991)..... 16
Board of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) 1
California v. Deep Sea Research, Inc., 523 U.S. 491 (1998)..... 12
Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821)..... 6, 9-10
Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989)..... 19
In re Creative Goldsmiths, 119 F.3d 1140 (4th Cir. 1997)..... 10
Edelman v. Jordan, 415 U.S. 651 (1974) 5, 9, 13
Federal Maritime Comm'n v. South Carolina State Port Auth., 535 U.S. 743 (2002)..... *passim*
In re Fernandez, 123 F.3d 241 (5th Cir.), *amended by* 130 F.3d 1138 (5th Cir. 1997)....21-22, 22
Fitzpatrick v. Bitzer, 427 U.S. 445 (1976)..... 15
Florida Prepaid Postsecond. Ed. Exp. Bd. v. College Savings Bank, 527 U.S. 627 (1999) 14
Hanover Nat'l Bank v. Moyses, 186 U.S. 181 (1902)..... 20, 21
Hans v. Louisiana, 134 U.S. 1 (1890)..... 13-14
Hess v. Port Authority Trans-Hudson Corp., 513 U.S. 30 (1994) 9-10
Hoffman v. Connecticut Dep't of Income Maintenance, 492 U.S. 96 (1989) 10, 23-24, 24

TABLE OF AUTHORITIES

Cases — Page

Hood v. Tennessee Student Assistance Corp., 319 F.3d 755 (6th Cir. 2003), *aff'd on other grounds*, 541 U. S. 440 (2004) ..... *passim*
Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997)..... 8, 12
McVey Trucking, Inc. v. Illinois, 812 F.2d 311 (7th Cir. 1987) 10-11
Mitchell v. Franchise Tax Bd., 209 F.3d 1111 (9th Cir. 2000) 11
In re New York, 256 U.S. 490 (1921) 19
In re New York, 256 U.S. 503 (1921) 12
Printz v. United States, 521 U.S. 898 (1997) 24
Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S.139 (1993)..... 7, 7-8
Railway Labor Executives Ass'n v. Gibbons, 455 U.S. 457 (1982) 4, 20, 22-23
In re Sacred Heart Hospital, 133 F.3d 237 (3d Cir. 1998)..... 10
Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996)..... *passim*
Stellwagen v. Clum, 245 U.S. 605 (1918) 20, 22
Tennessee Student Assistance Corp. v. Hood, 541 U.S. 440 (2004) ..... *passim*
Toof v. Martin, 80 U.S. (13 Wall.) 40 (1871)..... 24
United States v. Nordic Village, Inc., 503 U.S. 30 (1992).....3, 12, 13
United States v. Shaw, 309 U.S. 495 (1940)..... 13
Vanston Bondholders Protective Comm. v. Green, 329 U.S. 156 (1946) 22

Constitutional Provisions and Statutes

Act of April 4, 1800, ch. 19, § 62, 2 Stat. 19..... 24
Act of August 19, 1841, ch. 9, § 2, 5 Stat. 440..... 24

TABLE OF AUTHORITIES

	Page
Act of March 2, 1867, ch. 176, § 35, 14 Stat. 517...	24
Pub. Law. No. 103-394, title I, § 113, 108 Stat. 4117 (1994), codified at 11 U.S.C. § 106(a)	5, 24
28 U.S.C. § 1408(1).....	2, 9
28 U.S.C. § 1408(2).....	2, 9
U.S. Const., Art. I, § 8, cl. 4	20
Other Authorities	
Administrative Office of the U.S. Courts, *News Release: Bankruptcy Filings Fell in March 2005 12-Month Period* (June 10, 2005).....	11
Ralph Brubaker, *Of State Sovereign Immunity and Prospective Remedies: The Bankruptcy Discharge as Statutory* Ex Parte Young *Relief*, 76 Am. Bankr. L. J. 461 (2002).....	16
Vern Countryman, *The Concept of a Voidable Preference in Bankruptcy*, 38 Vand. L. Rev. 713 (1985).....	24
Alexander Hamilton, The Federalist No. 81 (I. Kramnick ed., 1987)	9
Frank R. Kennedy, *Bankruptcy and the Constitution*, 33 U. Mich. L. Quad Notes 40 (Spring 1989).....	17
James Madison, The Federalist No. 42 (I. Kramnick ed., 1987)	18
David A. Skeel, Jr., *Debt's Dominion, A History of Bankruptcy Law In America* (2001)	17
Charles Jordan Tabb, *The Law of Bankruptcy* (1997).....	*passim*
4A C. Wright & A. Miller, *Federal Practice and Procedure* (3d ed. 2002).....	11

INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county and municipal governments and officials throughout the United States.[1] *Amici* have a compelling interest in protecting state sovereignty from federal judicial encroachments.

The Eleventh Amendment is one of the principal constitutional protections of state sovereignty. The Amendment recognizes that "each State is a sovereign entity in our federal system" and that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996) (quotations and citations omitted). The Court has repeatedly held that "Congress may not . . . base its abrogation of the States' Eleventh Amendment immunity upon the powers enumerated in Article I." *See, e.g., Board of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 364 (2001).

The court of appeals blatantly disregarded settled authority in holding that Congress could validly abrogate the States' Eleventh Amendment immunity under its Article I Bankruptcy Clause powers and subject States to damages actions such as those brought here, which seek to avoid and recover alleged preferential transfers. Contrary to the understanding of the court of appeals, the framers no more contemplated that the need for federal uniformity in bankruptcy law justifies overriding the States' sovereign immunity than does the need for uniformity under the Commerce Clause or any other Article I power. Because "'Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction'" with respect to the States, *id.* (quoting *Seminole*

---

[1] The parties have consented to the filing of this *amicus* brief and their letters of consent have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity other than *amici* or their members made a monetary contribution toward its preparation or submission.

Tribe, 517 U.S. at 73), *amici* submit this brief to assist the Court in its resolution of this case.

SUMMARY OF ARGUMENT

1. Adversary proceedings against States in federal bankruptcy court that seek money damages violate the core purposes of Eleventh Amendment immunity. First, by subjecting States to suit at the instance of private parties, such suits deny the States the dignity and respect they are entitled to as co-sovereigns in the federal system. Indeed, these suits are an especially severe affront to the dignity of the States because a State can be summoned to defend itself in federal bankruptcy courts in numerous locations.

In contrast to federal district court litigation, nationwide service of process is available in bankruptcy proceedings. Moreover, "a defendant in an adversary proceeding . . . is subject to personal jurisdiction in a distant forum even if that defendant does not have 'minimum contacts' with that forum." Charles Jordan Tabb, *The Law of Bankruptcy* § 4.9, at 255 (1997). Furthermore, under bankruptcy's venue rules, a corporation can file its petition where either its "principal place of business" or "principal assets" are located. 28 U.S.C. § 1408(1). A corporation can also file in any district where one of its affiliates has a petition pending under Title 11. *Id.* § 1408(2). Thus, a State could be summoned to defend itself in an adversary proceeding occurring in a federal bankruptcy court thousands of miles away from the State.

State sovereign immunity also serves the critical function of protecting the States' fiscal integrity. Adversary proceedings pose a substantial threat to the States' fiscal integrity because of the large number and variety of contracts that States enter into in the course of administering government programs. Moreover, adversary proceedings could also be used to avoid and recover state tax payments. Given the large number of bankruptcy filings, a holding that the States' sovereign immunity does not bar adversary proceedings that seek money damages would expose the States to substantial and unpredictable liabilities and violate core Eleventh Amendment principles protecting a State's control over its treasury.

2. The four adversary proceedings at issue here are classic *in personam* actions which seek money damages and are barred by the Eleventh Amendment. In contrast to *Hood*, the trustee does not seek "a determination of the dischargeability of [a] debt," but rather "to recover property in the hands of the State on the grounds that the transfer was a voidable preference." *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 453-54 (2004). Each of the suits seeks to recover money damages from Virginia on the grounds that the state defendants received preferential transfers. These cases do not implicate a bankruptcy court's *in rem* jurisdiction as there is "no *res* to which the court's *in rem* jurisdiction could have attached." *United States v. Nordic Village, Inc.*, 503 U.S. 30, 38 (1992). Moreover, the Court has "never applied an *in rem* exception to the sovereign-immunity bar against monetary recovery." *Id.*

3. Notwithstanding this Court's holding in *Seminole Tribe* that Congress cannot abrogate the States' sovereign immunity under its Article I powers, the Sixth Circuit held in *Hood* that "the text of the Constitution and other evidence of the framers' intent demonstrate that under the Bankruptcy Clause . . . Congress has the power to abrogate state sovereign immunity." *Hood v. Tennessee Student Assistance Corp.*, 319 F.3d 755, 762 (6th Cir. 2003), *aff'd on other grounds*, 541 U.S. 440 (2004). While acknowledging that "[m]uch of the evidence regarding the plan of the Convention is ambiguous," 319 F.3d at 767, the Sixth Circuit reasoned that the "the power to make 'uniform' laws" and the framers' understanding of the bankruptcy clause demonstrate that the States surrendered their immunity from suit in bankruptcy. *Id.* at 762-68.

The framers, however, gave the subject of bankruptcy "only passing attention." Tabb, *The Law of Bankruptcy* § 1.6, at 32. Just one delegate to the convention voted against the clause and he did so because he believed that it would permit the punishment of bankruptcy by death. This is not the type of debate that would have ensued had the framers intended that the States grant Congress the power to abrogate their sovereign immunity under the clause.

The Bankruptcy Clause's text likewise does not provide probative, let alone compelling, evidence that the States surrendered their sovereign immunity with respect to bankruptcy proceedings. Indeed, the Court has recognized that the clause's uniformity requirement is a limitation on Congress' power to enact bankruptcy laws. *See Railway Labor Executives Ass'n v. Gibbons*, 455 U.S. 457, 468-69 (1982). It would be strange to read language that imposes limits on congressional power as also manifesting a surrender by the States of their sovereign immunity. Moreover, this Court has never held that the framers' grant to the federal government of authority over a substantive area because of the need for uniform rules is sufficient to establish that the States surrendered their immunity from private party suits in that area.

Historical practice supports the conclusion that Congress lacks power under the Bankruptcy Clause to subject States to suits for money damages. For nearly two hundred years following the ratification of the Constitution and a century and a half after federal bankruptcy law first recognized the voidable preferential transfer, Congress did not subject States to such suits. This longstanding view of its own powers is persuasive evidence that the Bankruptcy Clause does not grant Congress authority to abrogate the States' sovereign immunity. The judgment of the court of appeals should therefore be reversed.

ARGUMENT

STATES ARE IMMUNE FROM ADVERSARY PROCEEDINGS IN FEDERAL BANKRUPTCY COURT THAT SEEK MONETARY DAMAGES OR OTHER AFFIRMATIVE RELIEF

The court of appeals deemed itself bound by its earlier panel decision in *Hood v. Tennessee Student Assistance Corp.*, 319 F.3d 755 (6th Cir. 2003), *aff'd on other grounds*, 541 U.S. 440 (2004). *See* Pet. App. 2a. In that case, the Sixth Circuit held that the States surrendered their immunity from private suits in bankruptcy in the Constitutional Convention, and therefore the Bankruptcy Clause granted Congress the necessary authority to abrogate state sovereign immunity in 11 U.S.C. § 106(a). *See* 319 F.3d at 762-68; *see also* 541 U.S. at 445 (summarizing Sixth Circuit's holding). In *Hood*, this Court did not reach the question, holding "that a bankruptcy court's discharge of a student loan debt does not implicate a State's Eleventh Amendment immunity." *See* 541 U.S. at 445.

The question presented here—whether an adversary proceeding against a State that either seeks a payment on account or to avoid and recover a preferential transfer—does, by contrast, clearly implicate the Eleventh Amendment. Indeed, because the whole purpose of respondent's suits is to recover money from a State, it is a paradigmatic example of suits which this Court has held are prohibited by both the Eleventh Amendment and the structural principle of sovereign immunity. *See Alden v. Maine*, 527 U.S. 706, 750-54 (1999); *Edelman v. Jordan*, 415 U.S. 651, 678 (1974).

Contrary to the court of appeals' reasoning in *Hood*, there is no evidence that supports the notion that the States surrendered their sovereign immunity from suits for money damages in the context of bankruptcy proceedings. The rationale that such a surrender can be inferred from the

Bankruptcy Clause's grant to Congress of the power to make "uniform laws" on the subject is unsustainable. In contrast to the situation in *Hood*, which did not require a payment out of the state treasury, the framers did not intend that state treasuries be subjected to adversary proceedings whose purpose is, as here, to increase the assets of the bankruptcy estate and pay off the claims of private creditors. Indeed, protecting the States from the claims of private creditors was the very impetus behind the ratification of the Eleventh Amendment. *See Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 406 (1821). It is equally untenable to suggest that the States can be sued to recover damages that will be used to pay private parties who are not even the State's creditors but rather the creditors of the bankrupt debtor. The judgment of the court of appeals should therefore be reversed.

I. AN ADVERSARY PROCEEDING AGAINST A STATE WHICH SEEKS MONEY DAMAGES IS PROHIBITED BY THE STATE'S SOVEREIGN IMMUNITY

A. An Adversary Proceeding Against A State Violates The Core Purposes of Eleventh Amendment Immunity

The Constitution specifically recognizes that the States are "sovereign entities," that exercise "a substantial portion of the Nation's primary sovereignty" and possess "the dignity and essential attributes inhering in that status." *Alden*, 527 U.S. at 713-14. Moreover, "even as to matters within the competence of the National Government, the constitutional design secures the founding generation's rejection of 'the concept of a central government that would act upon and through the States' in favor of 'a system in which the State and Federal Governments would exercise concurrent authority over the people.'" *Id.* at 714 (citation omitted). This system of "[d]ual sovereignty is a defining feature of our Nation's constitutional blueprint." *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 751 (2002).

The States' "immunity from private suits," *id.* at 752, is "[a]n integral component of [their] 'residuary and inviolable sovereignty.'" *Id.* at 751 (quoting James Madison, The Federalist No. 39, at 245 (C. Rossiter ed. 1961)). The immunity "is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments." *Alden*, 527 U.S. at 713.[2] While the Court has recognized that the "States, in ratifying the Constitution, did surrender a portion of their inherent immunity by consenting to suits brought by sister States or by the Federal Government," it has repeatedly held that "the Convention did not disturb States' immunity from private suits." *Federal Maritime Comm'n*, 535 U.S. at 752.

The States' sovereign immunity from suits brought by private parties serves two principal functions. First, "the doctrine's central purpose is to 'accord the States the respect owed them as' joint sovereigns." *Id.* at 765 (quoting *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)). "'The very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the

---

[2] As Alexander Hamilton wrote:

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States . . . .

The Federalist No. 81, at 487 (C. Rossiter ed. 1961) (quoted in *Alden*, 527 U.S. at 716-17).

instance of private parties.'" *Puerto Rico Aqueduct*, 506 U.S. at 146 (quoting *In re Ayers*, 123 U.S. 443, 505 (1887)). *See also Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 268 (1997) (The States' sovereign immunity "is designed to protect" the "dignity and respect" owed the States as members of the Union.).

This fundamental principle of federalism is violated whether a suit is initiated in a federal court, *see Seminole Tribe*, 517 U.S. at 72-73, a state court, *see Alden*, 527 U.S. at 748-54, or an Article II administrative tribunal. *See Federal Maritime Comm'n*, 535 U.S. at 760. It is likewise offended when a State is summoned to defend itself before an Article I court such as a federal bankruptcy court. "Private suits against nonconsenting States . . . present 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties,' regardless of the forum." *Alden*, 527 U.S. at 749 (quoting *In re Ayers*, 123 U.S. at 505).

Adversary proceedings in federal bankruptcy court are an especially severe affront to the dignity and respect which a State is owed as a sovereign. In most cases implicating the Eleventh Amendment, at least the State is sued in a federal district court that is located within the State. In contrast, "nationwide service of process is available in proceedings within bankruptcy subject matter jurisdiction." Charles Jordan Tabb, *The Law of Bankruptcy* § 4.9, at 255 (1997).

"[A] defendant in an adversary proceeding in bankruptcy is subject to personal jurisdiction in a distant forum even if that defendant does not have 'minimum contacts' with that forum." *Id.* Thus, "the defendant only needs to have minimum contacts within the United States as a whole," *id.*, which every State obviously does. *See, e.g.*, J.A. 3 (Complaint against Central Va. Comm. College ¶ 6) ("Upon information and belief, Defendant is a resident of the United States."); *see also id.* at 10 (Complaint against VMI ¶ 6) (same).

Moreover, bankruptcy employs liberal venue rules. For example, a corporation can file in the district in which either its "principal place of business" or "principal assets" are located. 28 U.S.C. § 1408(1). Furthermore, "a corporation may file in any district in which there is pending a case under title 11 concerning an *affiliate* of the corporation." Tabb, *The Law of Bankruptcy* § 4.10, at 257 (citing 28 U.S.C. § 1408(2)). Because the definition of an "affiliate" encompasses "virtually any other corporation in a corporate group, be it a parent, subsidiary, or sister corporation," the "members of a corporate group [have] considerable venue choice." *Id.*

Thus, under the bankruptcy rules, a State could be summoned to defend itself in an adversary proceeding in a federal bankruptcy court thousands of miles away. While in this case, Virginia has been summoned to appear in bankruptcy court in Kentucky, itself a considerable affront to the dignity owed the State as a sovereign, Virginia could just have easily been summoned to appear in bankruptcy court in California.

State sovereign immunity also serves the critical function of protecting the States' fiscal integrity. *See Alden*, 527 U.S. at 750-51; *Federal Maritime Comm'n*, 535 U.S. at 765; *Edelman v. Jordan*, 415 U.S. at 668-69. "Private suits against nonconsenting States—especially suits for money damages—may threaten the financial integrity of the States." *Alden*, 527 U.S. at 750. Protecting the States from suits over their war debts was a major concern of the framers.[3] As Chief Justice Marshall explained: "'[A]t the adoption of the [C]onstitution, all the States were greatly indebted; and the apprehension that these debts might be prosecuted in the federal Courts' prompted swift passage of the Eleventh Amendment."

---

[3] *See* Alexander Hamilton, The Federalist No. 81, at 455 (I. Kramnick ed. 1987). Hamilton wrote that "there is no color to pretend that the State governments would, by adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith." *Id.*

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 406 (1821) (quoted in *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 40 n.9 (1994)).

This concern remains as important today as it was at the founding. "A general federal power to authorize private suits for money damages would place unwarranted strain on the States' ability to govern in accordance with the will of their citizens." *Alden*, 527 U.S. at 750-51. "[T]he allocation of scarce resources among competing needs and interests lies at the heart of the political process." *Id.* at 751. A State cannot possibly provide full redress for every call on the State's resources, whether it be the "legitimate claim" of a judgment creditor or the demands of political constituencies. *Id.* As the Court concluded in *Alden*, "[i]f the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government and invoked by the private citizen." *Id.*

This reasoning is fully applicable to adversary proceedings brought in bankruptcy court to recover money judgments from a State. Indeed, such suits would pose a substantial threat to the fiscal integrity of the States given the large number and variety of contracts that States enter into in the course of administering government programs. *See, e.g.*, *Hoffman v. Connecticut Dep't of Income Maintenance*, 492 U.S. 96, 99 (1989) (dispute over Medicaid payments); *Arecibo Community Health Care, Inc. v. Puerto Rico*, 270 F.3d 17, 21 (1st Cir. 2001) (hospital administration contract); *In re Sacred Heart Hospital*, 133 F.3d 237, 239-40 (3d Cir. 1998) (dispute over medical assistance payments not timely submitted to State). But for the States' sovereign immunity, such suits would also be used to avoid and recover state tax payments. *See Hoffman*, 492 U.S. at 99; *In re Creative Goldsmiths*, 119 F.3d 1140, 1143 (4th Cir. 1997); *McVey Trucking, Inc. v. Illinois*, 812 F.2d 311, 313-14 (7th Cir. 1987); *see also Mitchell v. Franchise Tax Bd.*, 209 F.3d 1111, 1115 (9th Cir. 2000) (asserting claims of common law fraud and violations of the California Revenue and Tax Code). Given the large number of bankruptcy filings,[4] a holding that States are not immune from adversary proceedings which seek money damages would not only require a dramatic departure from constitutional doctrine, it would also expose the States to substantial and unpredictable liabilities.

B. An Adversary Proceeding Which Seeks Payment On Account Or To Avoid A Preferential Transfer Is An *In Personam* Action And Not An *In Rem* Proceeding

This case involves four separate adversary proceedings against arms of the State of Virginia which seek far different relief than that sought by the debtor in *Hood*. In *Hood*, the debtor filed an adversary proceeding against a state entity to obtain a determination that her student loans were dischargeable as an undue hardship. *See* 541 U.S. at 444-45. Hood did not "seek monetary damages or any affirmative relief." *Id.* at 450. Rather, she sought only "a determination of the dischargeability of her debt." *Id.* at 453.

In *Hood*, the Court reasoned that "the Bankruptcy Court's *in rem* jurisdiction allows it to adjudicate the debtor's discharge claim without *in personam* jurisdiction over the State." *Id.* (citing 4A C. Wright & A. Miller, *Federal Practice and Procedure* § 1070, pp. 280-81 (3d ed. 2002)). In rejecting the State's defense of Eleventh Amendment immunity, the Court expressly noted that "[t]he case before us is thus unlike an adversary proceeding by the bankruptcy

---

[4] *See* Administrative Office of the U.S. Courts, *News Release: Bankruptcy Filings Fell in March 2005 12-Month Period* 1 (June 10, 2005) (reporting 1,590,975 bankruptcy filings in year ended March 31, 2005).

trustee seeking to recover property in the hands of the State on the grounds that the transfer was a voidable preference." *Id.* at 454.

By contrast, each of the adversary proceedings filed here were *in personam* actions which sought money damages from the State and are thus barred by the Eleventh Amendment. The complaints did not invoke *in rem* jurisdiction and did not seek to recover "particular dollars." *United States v. Nordic Village, Inc.*, 503 U.S. 30, 38 (1992) (internal quotations and citation omitted).[5]

For example, the complaint filed against Central Virginia Community College seeks a payment on account in the amount of $4,898.00, plus interest, attorneys' fees and costs. *See* J.A. 5. The complaint further seeks from the State the amount of $63,387.00, on the ground that that sum is an avoidable preferential transfer. *See id.* at 6a-7a.

The complaint against the Virginia Military Institute seeks a payment on account in the amount of $ 30,409.00, plus interest, attorneys' fees and costs. *See id.* at 11a-12a. The VMI complaint also seeks to avoid and recover as preferential transfers amounts of $25,595.00 and $77,654.00. *See id.* at 13a -15a (Counts III & IV).[6]

---

[5] Even when *in rem* jurisdiction is invoked, it is well established that the Eleventh Amendment prohibits a federal court from adjudicating a State's title to property when the State has possession of the property. *See California v. Deep Sea Research, Inc.*, 523 U.S. 491, 505-07 (1998); *In re New York*, 256 U.S. 503, 510-11 (1921). *See also Idaho v. Coeur d'Alene Tribe*, 521 U.S. at 289 (O'Connor, J., concurring).

[6] Likewise the adversary proceeding brought against Blue Ridge Community College included a "payment on account" claim of $35,317.60 (plus interest, attorneys' fees and costs) and to avoid and recover preferential transfers in the amount of $34,054.58 and $35,312.50. *See* J.A. 22a-25a. The adversary proceeding brought against New River Community College included a payment on account claim of $97,249.61 (plus interest, attorneys' fees and costs) and to avoid and recover preferential transfers in the amount of $65,264.00. *See id.* at 31a, 33a.

These adversary proceedings were thus clearly instituted for the purpose of recovering money judgments from state entities. Indeed, this case is nearly on all fours with *Nordic Village*, where the Court held that sovereign immunity barred an adversary proceeding brought against the United States to recover money paid to the Internal Revenue Service. Analyzing a claim similar to those brought here, the Court explained that the bankruptcy trustee:

> did not invoke, and the Bankruptcy Court did not purport to exercise, *in rem* jurisdiction. Respondent sought to recover a sum of money, not "particular dollars," so there was no *res* to which the court's *in rem* jurisdiction could have attached. In any event, we have never applied an *in rem* exception to the sovereign-immunity bar against monetary recovery, and have suggested that no such exception exists.

503 U.S. at 38-39 (quoting *Begier v. IRS*, 496 U.S. 53, 62 (1990), and citing *United States v. Shaw*, 309 U.S. 495, 502-03 (1940) (other citation omitted)).

To allow a federal bankrupcty court to adjudicate the adversary proceedings at issue here would violate the Eleventh Amendment's critical function of protecting the fiscal integrity of the States. *See Alden*, 527 U.S. at 750-51; *Federal Maritime Comm'n*, 535 U.S. at 765; *Edelman*, 415 U.S. at 668-69. Indeed, it would be an especially untoward result to allow these claims as their purpose is merely to increase the size of the bankruptcy estate and redistribute money from the State to the various creditors of Wallace's Bookstores and not to creditors of the State itself.

The Eleventh Amendment was adopted to protect the States from suits over their own war debts—a situation involving an exceedingly strong claim "on the conscience of the sovereign." *Hans v. Louisiana*, 134 U.S. 1, 13 (1890)

(quoting Hamilton, The Federalist No. 81). It is thus unsupportable to contend that the States should be subject to suits to recover sums of money to be used to enhance the recoveries of persons and entities that are not even creditors of the State.

II. CONGRESS DOES NOT HAVE POWER UNDER THE BANKRUPTCY CLAUSE OF ARTICLE I TO ABROGATE A STATE'S ELEVENTH AMENDMENT IMMUNITY

The Court has repeatedly held that "[e]ven when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72 (1996) (Indian Commerce Clause). *See also Florida Prepaid Postsecond. Ed. Exp. Bd. v. College Savings Bank*, 527 U.S. 627, 636 (1999) (same) (Patent Remedy Act). The Court has also explained that "[t]he Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." *Seminole Tribe*, 517 U.S. at 72-73.

Federal bankruptcy courts are Article I courts. The Court has held, however, that "it would be quite strange to prohibit Congress from exercising its Article I powers to abrogate state sovereign immunity in Article III judicial proceedings, but permit the use of those same Article I powers to create court-like administrative tribunals where sovereign immunity does not apply." *Federal Maritime Comm'n*, 535 U.S. at 761 (citing *Seminole Tribe*, 517 U.S. at 72). *See also Alden*, 527 U.S. at 754 ("[T]he States retain immunity from private suit in their own courts, an immunity beyond the congressional power to abrogate by Article I legislation."). So, too, a private party suit against a State brought in an Article I court

is just as offensive to the principle of state sovereign immunity as a suit brought in an Article II tribunal such as the Federal Maritime Commission.

It is a truism that "[t]he States have consented . . . to some suits pursuant to the plan of the Convention or to subsequent constitutional Amendments."[7] *Id.* at 755. The Court has recognized, however, that "in ratifying the Constitution," the States surrendered their immunity from suit in only the limited circumstances of "suits brought by other States or by the Federal Government." *Id.*

The court of appeals acknowledged "*Seminole Tribe*'s broad language barring Congress from abrogating state sovereign immunity pursuant to its Article I powers." *Hood*, 319 F.3d at 761. The court nonetheless held it not controlling, reasoning that "neither *Seminole Tribe* nor any of the Supreme Court's other recent sovereign immunity cases address Congress's Bankruptcy Clause powers as understood in the plan of the Convention." *Id.* at 761-62. *But see Seminole Tribe*, 517 U.S. at 72 n.16 ("[I]t has not been widely thought that the federal . . . bankruptcy . . . statutes abrogated the States' sovereign immunity."). Instead, the court of appeals concluded that "the text of the Constitution and other evidence of the Framers' intent demonstrate that under the Bankruptcy Clause of Article I, section 8, Congress has the power to abrogate state sovereign immunity." 319 F.3d at 762.

In so holding, the court of appeals heavily relied on Article I's grant to Congress of "the power to make 'uniform' laws." *Id.* at 763. The court also relied on what it believed to be the framers' understanding that the bankruptcy power was exclusive in the Federal Government, and its inference that a

---

[7] By adopting the Fourteenth Amendment, the States surrendered their immunity from suits by private parties brought under legislation enacted to enforce the protections of that Amendment. *See Alden*, 527 U.S. at 756 (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976)).

passage in *The Federalist* suggests "that the states shed their immunity from suit along with their power to legislate together when the states agreed to the Bankruptcy Clause's uniformity provision." *Id.* at 765.

Most remarkably, the court of appeals acknowledged that "[m]uch of the evidence regarding the plan of the Convention is ambiguous." *Id.* at 767. It nonetheless concluded that "the Constitution's text and Hamilton's reference in The Federalist No. 81 to the means of abrogating sovereignty in The Federalist No. 32 *suggests that*, with the Bankruptcy Clause, the states granted Congress the power to abrogate state sovereign immunity." *Id.* (emphasis added).

Contrary to the view of the Sixth Circuit, these "suggestions" fall far short of the "compelling evidence" required by this Court to find "a surrender inherent in the constitutional compact." *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 781 (1991); *see also Alden*, 527 U.S. at 741 (no abrogation "in the constitutional compact" absent "'compelling evidence'") (quoting *Blatchford*, 501 U.S. at 781). At most, they establish that the States surrendered their legislative power over the subject of bankruptcy, a conclusion which itself is dispelled by the history of federal bankruptcy law. *See* Tabb, *The Law of Bankruptcy* § 1.6, at 33.

Indeed, history, practice, and precedent—all of which were ignored by the Sixth Circuit—refute its holding. As one authority concludes, "[p]urely deductive logical arguments . . . relying upon certain oblique cross-references in the Federalist Papers, that the states *necessarily* surrendered their sovereign immunity with respect to federal bankruptcy proceedings in ratifying the Constitution, are contradicted by the historical context in which the Framers crafted that document." Ralph Brubaker, *Of State Sovereign Immunity and Prospective Remedies: The Bankruptcy Discharge as Statutory* Ex Parte Young *Relief*, 76 Am. Bankr. L.J. 461, 481-82 (2002) (footnote omitted).

As a leading authority explains, "[t]he subject of bankruptcy received only passing attention from the framers at the Constitutional Convention of 1787." Tabb, *The Law of Bankruptcy* § 1.6, at 32. "The Founding Fathers included the provision almost as an afterthought. Charles Pinckney . . . proposed the Bankruptcy Clause late in the constitutional convention of 1787, and it was approved with little debate." David A. Skeel, Jr., *Debt's Dominion: A History of Bankruptcy Law In America* 23 (2001).

Another commentator observes that Pinckney proposed the clause as an amendment to the Full Faith and Credit Clause. Frank R. Kennedy, *Bankruptcy and the Constitution*, 33 U. Mich. L. Quad. Notes 40, 40 (Spring 1989). Pinckney's proposal followed "a discussion on the Convention floor of the question whether a state insolvency act should be treated like a state court judgment. At least one delegate to the Convention had represented clients in litigation presenting the question whether a discharge granted in one state was binding on the courts of another state." *Id.* While the clause was eventually removed from the Full Faith and Credit Clause and placed immediately following the commerce clause in Article I, section 8, it "was adopted with 'practically no debate.'" *Id.*

Significantly, only one delegate (Roger Sherman of Connecticut) voted against the clause's adoption. The basis of Sherman's objection was that the clause "would permit the punishment of bankruptcy by death as under the early laws of England." *Id.* In response, Gouverneur Morris of Pennsylvania "acknowledged that bankruptcy was 'an extensive and delicate subject,' but . . . 'saw no danger of abuse by the legislature of the United States.'" *Id.*

This is hardly the type of debate that would have ensued if the framers had intended that the States grant Congress the power to abrogate their sovereign immunity under the clause. Indeed, had that been the framers' understanding, there un-

doubtedly would have been a vigorous and extensive debate on the matter.

Thus, the Bankruptcy Clause's reference to "uniform laws" in its grant of power reflects the view of the framers that "[a] federal bankruptcy law was apparently believed . . . necessary because of the problems for commerce and for nonresident creditors stemming from varying and discriminatory state laws." Tabb, *The Law of Bankruptcy* § 1.6, at 32. *See also id.* § 1.9, at 44 ("Nonresident creditors might be discriminated against by local state laws, and also might have difficulty in reaching property of the debtor located in or removed to another state."). Thus, for the same reason that the States granted legislative authority to the Federal Government over interstate commerce, the States granted Congress power over bankruptcy. As Madison explained:

> The power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different States, that the expediency of it seems not likely to be drawn into question.

The Federalist No. 42, at 278 (Isaac Kramnick ed., 1987).

At most then, the clause represents a grant by the States to the Federal Government of legislative authority over the subject of bankruptcy.[8] This grant, however, falls far short of the compelling evidence required to establish that the States surrendered their immunity from suits by private parties as part

[8] This view is consistent with the continuation of state authority over bankruptcy for much of the nineteenth century as well as the continuing role that state law plays in bankruptcy. *See* Tabb, *The Law of Bankruptcy* § 1.6, at 32-33 ("A federal bankruptcy law was in existence only from 1800 to 1803, from 1841 to 1843, and from 1867 to 1878. . . . The states picked up the slack and continued to regulate debtor-creditor relations and bankruptcy and insolvency during this lengthy era of federal inaction.").

of the plan of the convention. Indeed, the Court has never held that the framers' grant to the federal government of authority over certain substantive areas because of the need for uniform rules is sufficient to establish that the States surrendered their immunity from private party suits in that area.

For example, the Constitution grants the federal courts jurisdiction over admiralty and maritime cases because of the need for uniform rules in the area. The Court, however, has rejected the contention that "[t]he constitutional necessity of uniformity in the regulation of maritime commerce limits the States' sovereignty with respect to the Federal Government's authority to regulate that commerce," and subjects unconsenting States to private party suits for damages. *Federal Maritime Comm'n*, 535 U.S. at 767 (internal quotations and citation omitted). *See also Ex parte New York*, 256 U.S. 490, 502-03 (1921) ("It is not inconsistent [with need for uniformity of maritime law] to accord to the states, which enjoy the prerogatives of sovereignty to the extent of being exempt from litigation at the suit of individuals in all other judicial tribunals, a like exemption in the courts of admiralty and maritime jurisdiction.").

So, too, the Indian Commerce Clause grants Congress "plenary power to legislate in the field of Indian affairs." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989). But as the Court explained in *Seminole Tribe*, "the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is in an area . . . that is under the exclusive control of the Federal Government." 517 U.S. at 72. Accordingly, "'[e]ven when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.'" *Id.*

Nor does the Bankruptcy Clause's text, granting to Congress the power "[t]o establish . . . uniform [l]aws on the subject of Bankruptcies," U.S. Const. Art. I, § 8, cl. 4, provide probative, let alone compelling, evidence that the States surrendered their sovereign immunity with respect to bankruptcy proceedings. Quite the opposite, the Court has recognized that the uniformity requirement is a limitation on Congress' power under the clause. As the Court has explained:

> Unlike the Commerce Clause, the Bankruptcy Clause itself contains an affirmative limitation or restriction upon Congress' power: bankruptcy laws must be uniform throughout the United States. Such uniformity in the applicability of legislation is not required by the Commerce Clause. Thus, if we were to hold that Congress had the power to enact nonuniform bankruptcy laws pursuant to the Commerce Clause, we would eradicate from the Constitution *a limitation on the power of Congress to enact bankruptcy laws.*

Railway Labor Executives Ass'n v. Gibbons, 455 U.S. 457, 468-69 (1982) (emphasis added). It would be strange to read language that imposes limits on congressional power, as also manifesting a surrender by the States of their sovereign immunity. The Sixth Circuit, however, did not even acknowledge *Gibbons*. *See* 319 F.3d at 763-64 (discussing uniformity requirement).

Nor can the contention that the Bankruptcy Clause's "uniformity" requirement manifests a surrender of sovereign immunity be squared with the Court's longstanding interpretation of its meaning. As the Court long ago explained, "[t]he laws passed on the subject must . . . be uniform throughout the United States, but that uniformity is geographical and not personal." *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 188 (1902); *see also Stellwagen v. Clum*, 245 U.S. 605, 613 (1918).

Thus, in *Moyses* the Court upheld the application of state exemption laws, which shield certain assets from creditors, in bankruptcy proceedings. In so holding, the Court stated that "[i]t was many times ruled that this provision was not in derogation of the limitation of uniformity because all contracts were made with reference to existing laws, and no creditor could recover more from his debtor than the unexempted part of his assets." 186 U.S. at 189. The Court further explained that:

> the system is, in the constitutional sense, uniform throughout the United States, when the trustee takes in each State whatever would have been available to the creditors if the bankrupt law had not been passed. The general operation of the law is uniform although it may result in certain particulars differently in different States.

Id. at 190.[9]

So, too, the existence of Eleventh Amendment immunity does not render the bankruptcy scheme non-uniform as the concept of uniformity has been interpreted by this Court. Rather, those persons and entities that contract with a State are presumably aware whether the State has waived its Eleventh Amendment immunity with respect to any dispute arising under the contract. Recognizing the continued applicability of Eleventh Amendment immunity simply results in "the trustee tak[ing] in each State whatever would have been available to the creditors if the bankrupt law had not been passed." *Id.* "Holding that federal courts do not have jurisdiction over the states without their consent does not

---

[9] "[M]ost laws governing the substance of the debtor-creditor relationship are *state* laws," and it is commonplace in bankruptcy "that debtors and creditors in different states may be treated differently on similar facts." Tabb, *The Law of Bankruptcy* § 1.9, at 46. As Tabb explains, "a debtor in California might be liable in bankruptcy on a claim for breach of a cohabitation agreement, while a Vermont debtor might not be liable on such a claim on identical facts." *Id.*

frustrate this requirement of geographic uniformity since sovereign immunity applies uniformly to all states and to all parties in a bankruptcy proceeding." *In re Fernandez*, 123 F.3d 241, 244 (5th Cir.), *amended by* 130 F.3d 1138, 1139 (5th Cir. 1997).

Notwithstanding this reality, in *Hood* the Sixth Circuit rejected the argument that "[t]he 'uniformity' provision is . . . '"a requirement of geographic uniformity" and nothing more.'" 319 F.3d at 763 (quoting *Fernandez*, 123 F.3d at 244 (quoting *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 172 (1946) (Frankfurter, J., concurring)). According to the court of appeals, the "language from Justice Frankfurter's concurring opinion in *Vanston* was inconsistent with the majority opinion in that case," which the Sixth Circuit read as holding that the "the asserted claim was inconsistent with federal bankruptcy policies and thus could not be asserted—regardless of its status under state law." *Id.* The court of appeals thus concluded that "[o]n the [*Vanston*] majority's reasoning, federal courts must do more than treat state laws uniformly; federal courts must enforce federal bankruptcy law. If *Vanston* is any guide as to what uniformity requires, then uniformity requires much more than Justice Frankfurter's concurrence suggests." *Id.* at 763-64.

That "federal courts must enforce federal bankruptcy law" says at most that federal law preempts conflicting state law. It says nothing about whether Congress has power under Article I to override the States' constitutionally protected immunity from suits for money damages. Indeed, the court of appeals simply ignored this Court's decision in *Moyses* as well as other cases which hold that "all that the Constitution requires is 'geographical' uniformity, rather than personal uniformity." Tabb, *The Law of Bankruptcy* § 1.9, at 47. *See Stellwagen*, 245 U.S. at 613. And the court of appeals also ignored this Court's holding in *Gibbons* that the "uniformity" language is "a limitation on the power of Congress to enact bankruptcy laws." 455 U.S. at 469.

The text of the Bankruptcy Clause thus provides no support for the notion that it was intended to be a surrender by the States of their sovereign immunity with respect to adversary proceedings. Indeed, it would be highly anomalous to recognize that the Bankruptcy Clause, with its textual limitation on Congressional power, in reality grants Congress broader power than it has under the Commerce Clause. *See Seminole Tribe*, 517 U.S. at 72-73 n.16.

The Sixth Circuit in *Hood* also found it persuasive that during the state ratification debates "none of the debaters objected to subjecting the states to federal suits in bankruptcy." 319 F.3d at 767. This absence of opposition, the Sixth Circuit reasoned, "*could* . . . reflect the ratifiers' acceptance that because a federal bankruptcy system could cure the previous systems' ills only if it applied uniformly to all creditors and debtors, the Bankruptcy Clause must grant Congress the power to abrogate the states' sovereign immunity." *Id.* (emphasis added).

The court's reasoning ignores the most realistic possibility—that adversary proceedings against a State to void and recover preferential transfers were never contemplated by the members of the founding generation. *See* discussion *supra* at 17 (absence of debate on Bankruptcy Clause). Indeed, it was not until 1978, nearly 200 years after the ratification of the Constitution and 140 years after federal bankruptcy law first recognized the voidable preferential transfer, that Congress even attempted to subject the States to suits for money damages under the bankruptcy clause. *See Hoffman v. Connecticut Dept. of Income Maintenance*, 492 U.S. at

100-04 (plurality op.); *see also id.* at 111-13 (Stevens, J. dissenting).[10]

This longstanding view of its own powers is compelling evidence that Congress lacks authority to abrogate the States' sovereign immunity under the bankruptcy clause.[11] *See Printz v. United States*, 521 U.S. 898, 905 (1997) (If "earlier Congresses avoided use of this highly attractive power, we would have reason to believe that the power was thought not to exist."); *see also id.* at 918 (rejecting recent statutes as evidence of congressional power to require state and local executive officials to administer a federal regulatory program; "Their persuasive force is far outweighed by almost two centuries of apparent congressional avoidance of the practice."). As the Court explained in *Seminole Tribe*, "it has not been widely thought that the federal . . . bankruptcy . . . . statutes abrogated the States' sovereign immunity. . . .

---

[10] That attempt was, of course, ineffective. *See Hoffman*, 492 U.S. at 104 (plurality op.); *id.* at 105 (O'Connor, J., concurring). It was not until the Bankruptcy Reform Act of 1994 that Congress clearly expressed its intent to abrogate the States' Eleventh Amendment immunity. *See* Pub. L. No. 103-394, title I, § 113, 108 Stat. 4106, 4117 (1994) (codified at 11 U.S.C. § 106).

[11] While the first federal bankruptcy statute (Act of April 4, 1800, ch. 19, § 62, 2 Stat. 19-21) allowed for avoidance of fraudulent conveyances, "the act said nothing about preferential transfers." Vern Countryman, *The Concept of a Voidable Preference in Bankruptcy*, 38 Vand. L. Rev. 713, 719 (1985).

The concept of a voidable preferential transfer first appeared in the "short-lived Bankruptcy Act of 1841." *See id.* (discussing 5 Stat. 440, § 2 (1841)). It has been a part of all subsequent federal bankruptcy statutes. *See id.* at 719-35; *see also Toof v. Martin*, 80 U.S. (13 Wall.) 40, 46 (1871) (discussing 14 Stat. 517, § 35 (1867) ("That clause was intended to defeat preferences to a creditor, made by a debtor when insolvent or in contemplation of insolvency. . . . [The clause] authorizes in such case the assignee to recover the property or its value from the party who receives it.")). Yet Congress did not subject the States to adversary proceedings to avoid and recover preferential transfers until the late twentieth century.

Although the . . . bankruptcy laws have existed practically since our Nation's inception, . . . there is no established tradition in the lower federal courts of allowing enforcement of those federal statutes against the States." 517 U.S. 72-73 & n.16.

Thus, none of the crucial evidence—the Bankruptcy Clause's text, the framers' understanding of its meaning, this Court's interpretation of the clause, or the ratification debates—supports the court of appeals' holding that the States surrendered their immunity from suits for damages in bankruptcy. There is therefore no basis for treating Congress' attempt to abrogate the States' sovereign immunity in bankruptcy differently from other Article I abrogation legislation which the Court has invalidated as beyond Congress' power.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

RICHARD RUDA*
Chief Counsel
JAMES I. CROWLEY
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 309
Washington, D.C. 20001
(202) 434-4850

* Counsel of Record for the
Amici Curiae

June 17, 2005

No. 04-885

Supreme Court, U.S.
FILED
JUN 17 2005
OFFICE OF THE CLERK

In The
Supreme Court of the United States

CENTRAL VIRGINIA COMMUNITY COLLEGE,
VIRGINIA MILITARY INSTITUTE,
NEW RIVER COMMUNITY COLLEGE, and
BLUE RIDGE COMMUNITY COLLEGE,

Petitioners,

v.

BERNARD KATZ, Liquidating Supervisor for
Wallace's Bookstores, Inc.,

Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Sixth Circuit**

BRIEF OF THE PETITIONERS

JUDITH WILLIAMS JAGDMANN
Attorney General of Virginia

WILLIAM E. THRO
State Solicitor General
Counsel of Record

CARLA R. COLLINS
MATTHEW M. COBB
ERIC A. GREGORY
JOEL C. HOPPE
COURTNEY M. MALVEAUX
VALERIE L. MYERS
A. CAMERON O'BRION
RONALD N. REGNERY
D. MATHIAS ROUSSY, JR.
WILLIAM R. SIEVERS
Associate State Solicitors General

BERNARD L. MCNAMEE II
Chief Deputy Attorney General

MAUREEN RILEY MATSEN
Deputy Attorney General

OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
Telephone: (804) 786-2436
Facsimile: (804) 786-1991

Counsel for the Petitioners

June 17, 2005

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

May Congress use the Article I Bankruptcy Clause, U.S. Const. art. I, § 8, cl. 4, to abrogate the States' sovereign immunity?

PARTIES TO THE PROCEEDINGS

The Petitioners are four public institutions of higher education – Central Virginia Community College, Virginia Military Institute, New River Community College, and Blue Ridge Community College.

The Respondent is Bernard Katz, who is the Liquidating Supervisor for the bankrupt estate of *In re Wallace's Bookstores, Inc.*, No. 01-50545 (Bkr. E.D. Ky.). Katz commenced a bankruptcy adversary proceeding against each of the Petitioners.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE	2
INTRODUCTION	4
STATEMENT OF THE CASE	7
SUMMARY OF ARGUMENT	14
ARGUMENT	15
I. CONGRESS MAY NOT USE THE ARTICLE I BANKRUPTCY CLAUSE TO ABROGATE SOVEREIGN IMMUNITY	15
A. The Constitution Creates Dual Sovereigns	16
B. The States Have Immunity From Suit	19
C. The Abrogation Exception Is Limited To Circumstances Where Congress Is Enforcing the Fourteenth Amendment	24
II. THE BANKRUPTCY CLAUSE'S UNIFORMITY REQUIREMENT DOES NOT ALTER THE ANALYSIS	32
A. The Uniformity Requirement Does Not Require That The States Be Treated Like Private Parties	33
B. The Need for National Uniformity Does Not Trump The States' Sovereign Immunity	36

TABLE OF CONTENTS – Continued

Page

C. The Uniformity Requirement Limits the Power of Congress 38

III. HAMILTON'S WRITINGS DO NOT ALTER THE ANALYSIS 43

A. The Lower Court Misinterpreted Hamilton ... 43

B. Hamilton's Views Are Not Dispositive 46

C. Acceptance of the Lower Court's Interpretation Would Transform This Court's Dual Sovereignty Jurisprudence 47

CONCLUSION 50

TABLE OF AUTHORITIES

Page

CASES

Alden v. Maine,
527 U.S. 706 (1999) ..... *passim*

Arecibo Cmty. Health v. Puerto Rico,
270 F.3d 17 (1st Cir. 2001) 26

Atascadero State Hosp. v. Scanlon,
473 U.S. 234 (1985) ..... *passim*

Barron v. Mayor of Baltimore,
32 U.S. (7 Pet.) 243 (1833) 26

Blanchette v. Connecticut General Ins. Corporations,
419 U.S. 102 (1974) 34

Blatchford v. Native Vill. of Noatak,
501 U.S. 775 (1991) 17, 21, 27

Board of Trustees of Univ. of Alabama v. Garrett,
531 U.S. 356 (2001) 5, 28, 37, 38, 48

Bonito Boats, Inc. v. Thunder Craft Boats, Inc.,
489 U.S. 141 (1989) 37

Brown v. Smart,
145 U.S. 454 (1892) 40

Butner v. United States,
440 U.S. 48 (1979) 34

California v. Deep Sea Research, Inc.,
523 U.S. 491 (1998) 22

Camps Newfound/Owatonna, Inc. v. Town of Harrison,
520 U.S. 564 (1997) 39

TABLE OF AUTHORITIES – Continued

Page

Chao v. Virginia Dep't of Transp.,
291 F.3d 276 (4th Cir. 2002) 22

Chisholm v. Georgia,
2 U.S. (2 Dall.) 419 (1793) 20, 46, 47

Citizens Bank of Maryland v. Strumpf,
516 U.S. 16 (1995) 34

City of Boerne v. Flores,
521 U.S. 507 (1997) 27, 49

College Sav. Bank v. Florida Prepaid Postsecondary Education Expense Bd.,
527 U.S. 666 (1999) ..... *passim*

Cook v. Gralike,
531 U.S. 510 (2001) 19

Coyle v. Smith,
221 U.S. 559 (1911) 19, 49

Crosby v. National Foreign Trade Council,
530 U.S. 363 (2000) 19

Cutter v. Wilkinson,
125 S. Ct. 2113 (2005) 30

DeBauche v. Virginia Commonwealth Univ.,
7 F. Supp. 2d 718 (E.D. Va. 1998) 1

Dellmuth v. Muth,
491 U.S. 223 (1989) 28

Department of the Army v. Blue Fox,
525 U.S. 255 (1999) 45

Doe v. Regents of the Univ. of California,
519 U.S. 425 (1997) 21

Edelman v. Jordan,
415 U.S. 651 (1974) 23

TABLE OF AUTHORITIES – Continued

Page

Ex Parte Young,
209 U.S. 123 (1908) 23

Federal Communications Comm'n v. Nextwave Pers. Communications, Inc.,
537 U.S. 293 (2003) 33

Federal Maritime Comm'n v. South Carolina State Ports Auth.,
535 U.S. 743 (2002) ..... *passim*

Fernandez v. PNL Asset Mgmt. Co. LLC (In re Fernandez),
123 F.3d 241 (5th Cir.),
amended by 130 F.3d 1138 (5th Cir. 1997) 6, 11

Fitzpatrick v. Bitzer,
427 U.S. 445 (1976) 24, 27

Florida Dep't of Health and Rehabilitative Svcs. v. Florida Nursing Home Ass'n,
450 U.S. 147 (1981) 24

Florida Prepaid Postsecondary Education Expense Bd. v. College Sav. Bank,
527 U.S. 627 (1999) ..... *passim*

Frew v. Hawkins,
124 S. Ct. 899 (2004) 23

Gardner v. New Jersey,
329 U.S. 565 (1947) 22, 30

Grabscheid v. Michigan Employment Sec. Comm'n (In re C.J. Rogers, Inc.),
212 B.R. 265 (E.D. Mich. 1997) 26

Georgia Higher Education Assistance Corp. v. Crow (In re Crow),
394 F.3d 918 (11th Cir. 2004) 6, 11, 28

TABLE OF AUTHORITIES – Continued

Page

Gregory v. Ashcroft,
501 U.S. 452 (1991) 18

Hanover Nat'l Bank v. Moyses,
186 U.S. 190 (1902) 34

Hans v. Louisiana,
134 U.S. 1 (1890) ..... *passim*

Hess v. Port Authority Trans-Hudson Corporation,
513 U.S.30 (1994) 20

Hodel v. Indiana,
452 U.S. 314 (1981) 38

Hoffman v. Connecticut Dep't of Income Maint.,
492 U.S. 96 (1989) 5, 31, 48

Hood v. Tennessee Student Assistance Corp. (In re Hood),
319 F.3d 755 (6th Cir. 2003) (*Hood I*) ..... *passim*

Hughes v. Oklahoma,
441 U.S. 322 (1979) 39

Idaho v. Coeur d'Alene Tribe,
521 U.S. 261 (1997) 23

In re New York,
256 U.S. 490 (1921) 21

Johnson v. California,
125 S. Ct. 1141 (2005) 26

Kennecott Copper Corp. v. State Tax Comm'n,
327 U.S. 573 (1946) 24

Kimel v. Florida Bd. of Regents,
528 U.S. 62 (2000) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Kiowa Tribe of Oklahoma v. Manufacturing Techs., Inc.,
523 U.S. 751 (1998) 22

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803) 25

Mitchell v. Franchise Tax Bd. (In re Mitchell),
209 F.3d 1111 (9th Cir. 2000) 6, 11

Moltan Co. v. Eagle-Picher Indus., Inc.,
55 F.3d 1171 (6th Cir. 1995) 7

Nelson v. La Crosse County Dist. Attorney (In re Nelson),
301 F.3d 820 (7th Cir. 2002) 6, 11

Nevada Dep't of Human Resources v. Hibbs,
538 U.S. 721 (2003) 28

New York v. United States,
505 U.S. 144 (1992) 18, 19, 25, 49

Northern Pipeline Const. Co. v. Marathon Pipeline Co.,
458 U.S. 50 (1982) 29

Ogden v. Saunders,
25 U.S. (12 Wheat.) 213 (1827) 40

Ohio Agric. Commodity Depositors Fund v. Mahern (In re Merchants Grain)
59 F.3d 630 (7th Cir. 1995)
cert. granted, judgment vacated, and remanded,
517 U.S. 1130 (1996) 6

Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe,
498 U.S. 505 (1991) 22

Oklahoma Tax Comm'n v. Jefferson Lines, Inc.,
514 U.S. 175 (1995) 39

TABLE OF AUTHORITIES – Continued

Page

Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.), 4 F.3d 1095 (2d Cir. 1993) 29

Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981) 18

Pennsylvania v. Union Gas, 491 U.S. 1 (1989) ..... *passim*

Principality of Monaco v. Mississippi, 292 U.S. 313 (1934) 21

Printz v. United States, 521 U.S. 898 (1997) 18, 19, 49

Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993) 10, 20, 21

Quern v. Jordan, 440 U.S. 332 (1979) 23

Railway Labor Executives Ass'n v. Gibbons, 455 U.S. 457 (1982) 33, 34, 38, 39, 41

Raleigh v. Illinois Dep't of Revenue, 530 U.S. 15 (2000) 34

Reno v. Condon, 528 U.S. 141 (2000) 19, 36

Sacred Heart Hosp. v. Department of Pub. Welfare (In re Sacred Heart Hosp.), 133 F.3d 237 (3rd Cir. 1998) 6, 11

Saenz v. Roe, 526 U.S. 489 (1999) 19, 26

TABLE OF AUTHORITIES – Continued

Page

Schlossberg v. Maryland (In re Creative Goldsmiths), 119 F.3d 1140 (4th Cir. 1997) 6, 11, 25, 28

Secretary of Agric. v. Central Roig Refining Co., 338 U.S. 604 (1950) 38

Seminole Tribe v. Florida, 517 U.S. 44 (1996) ..... *passim*

Shepard v. Irving, 204 F. Supp. 2d 902 (E.D. Va. 2002) 1

Smith v. Reeves, 178 U.S. 436 (1900) 21, 24

Stellwagen v. Clum, 245 U.S. 605 (1918) 34

Straight v. Wyoming Dep't of Transp. (In re Straight), 143 F.3d 1387 (10th Cir. 1997) 26

Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819) 39

Tennessee v. Lane, 541 U.S. 509 (2004) 28

Tennessee Student Assistance Corp. v. Hood, 124 S. Ct. 1905 (2004) (*Hood II*) ..... *passim*

Texas v. White, 74 U.S. (7 Wall.) 700 (1868) 17

Thorpe v. Virginia State Univ., 6 F. Supp. 2d 507 (E.D. Va. 1998) 1

Tindal v. Wesley, 167 U.S. 204 (1897) 22

TABLE OF AUTHORITIES – Continued

Page

United States v. King,
395 U.S. 1 (1969) 23

United States v. Lopez,
514 U.S. 549 (1995) 18, 19, 49

United States v. Morrison,
529 U.S. 598 (2000) 19, 49

United States v. Nordic Village Inc.,
503 U.S. 30 (1992) 31

United States v. Shaw,
309 U.S. 495 (1940) 22

United States v. United States Fidelity & Guaranty Co.,
309 U.S. 506 (1940) 22

U.S. Term Limits v. Thornton,
514 U.S. 779 (1995) 16, 19

University of Virginia v. Robertson (In re Robertson),
243 B.R. 657 (W.D. Va. 2000) 1

Vanston Bondholders Protective Comm. v. Green,
329 U.S. 156 (1946) 35

Virginia v. Maryland,
540 U.S. 56 (2003) 22

Will v. Michigan State Police,
491 U.S. 58 (1989) 18

William Ross, Inc. v. Biehn Const., Inc. (In re William Ross, Inc.),
199 B.R. 551 (Bankr. W.D. Pa. 1996) 29

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 8, cl. 3 ..... *passim*

U.S. Const. art. I, § 8, cl. 4 ..... *passim*

U.S. Const. art. I, § 8, cl. 8 ..... 37, 48

U.S. Const. art. I, § 10, cl. 1 39

U.S. Const. art. III 25

U.S. Const. amend. II 27

U.S. Const. amend. III 27

U.S. Const. amend. V 27

U.S. Const. amend. VII 27

U.S. Const. amend. VIII 27

U.S. Const. amend. X ..... *passim*

U.S. Const. amend. XI ..... *passim*

U.S. Const. amend. XIII, § 2 26

U.S. Const. amend. XIV ..... *passim*

U.S. Const. amend. XIV, § 5 ..... *passim*

U.S. Const. amend. XV, § 2 26

U.S. Const. amend. XIX, § 2 26

U.S. Const. amend. XXIII, § 2 26

U.S. Const. amend. XXIV, § 2 26

U.S. Const. amend. XXVI, § 2 26

TABLE OF AUTHORITIES – Continued

Page

Declaration of Independence 17

Florida Const. art. X, § 4 35

Articles of Confederation, art. II (repealed 1788) 17

STATUTES

11 U.S.C. § 106(a) 1, 3, 24, 28, 29

11 U.S.C. § 106(a)(1) 29

11 U.S.C. § 106(b) 25

11 U.S.C. § 109(b)(1) 34

11 U.S.C. § 109(b)(2) 34

11 U.S.C. § 109(d) 34

11 U.S.C. § 362(a) 33

11 U.S.C. § 362(b)(4) 33

11 U.S.C. § 502 8

11 U.S.C. § 505 33

11 U.S.C. § 507(a)(8) 33

11 U.S.C. § 522(b) 35

11 U.S.C. § 525 33

11 U.S.C. § 541 29

11 U.S.C. § 542 30

11 U.S.C. § 544 7

11 U.S.C. § 547 7

11 U.S.C. § 550 7

TABLE OF AUTHORITIES – Continued

Page

11 U.S.C. § 553(a) 34

11 U.S.C. § 724(b) 33

11 U.S.C. §§ 901 through 946 34

11 U.S.C. §§ 1201 through 1231 34

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2403(a) 1

Virginia Code § 34-4 35

RULES

Sup. Ct. R. 29.4(b) 1

LEGISLATIVE HISTORY

House Judiciary Committee, Bankruptcy Reform Act of 1994 – Section-By-Section Description, Cong. Rec. H 10764, 10766 (103d Cong., 2d Sess., Oct. 4, 1994) 29

OTHER AUTHORITIES

Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425 (1987) 44

Akhil Reed Amar, *The Bill of Rights* (1998) 25

Karen Cordry, *Seminole Seven Years On*, in *Annual Survey of Bankruptcy Law 2002-03*, (William L. Norton ed. 2003) 30, 36, 40, 48

TABLE OF AUTHORITIES – Continued

Page

David P. Curie,
The Constitution in the Supreme Court: The First Hundred Years, 1789-1888 (1985) 39

Michael Kent Curtis,
No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights (1986) 27

Max Farrand,
The Framing of the Constitution of the United States (1913) 40

Adam Feibelman,
Federal Bankruptcy Law and State Sovereign Immunity,
81 Tex. L. Rev. 1381 (2003) 36, 42

The Federalist No. 28 (Alexander Hamilton) 17, 44

The Federalist No. 32 (Alexander Hamilton) .....*passim*

The Federalist No. 39 (James Madison) 19

The Federalist No. 42 (James Madison) 32, 41

The Federalist No. 51 (James Madison) 17

The Federalist No. 80 (Alexander Hamilton) 12

The Federalist No. 81 (Alexander Hamilton) ... 11, 13, 19, 43

The Federalist No. 82 (Alexander Hamilton) 44, 45

1 *The Founders Constitution*
(Phillip Kurland & Ralph Lerner, eds.,
Liberty Fund 2005) 46

Lawrence Friedman,
A History of American Law (1973) 41, 42

TABLE OF AUTHORITIES – Continued

Page

Kermit L. Hall (ed.),
Oxford Companion to the Supreme Court of the United States (2nd ed. 2005) 46

1 Alfred H. Kelly, Winfred A. Harbison & Herman Belz,
The American Constitution: Its Origins and Development (7th ed. 1991) 16

David E. Kyvig,
Explicit & Authentic Acts: Amending the U.S. Constitution, 1776-1995 (1996) 47

John T. Noonan, Jr.,
Narrowing the Nation's Power: The Supreme Court Sides with the States (2002) 49

2 David M. O'Brien,
Constitutional Law and Politics (5th ed. 2003) 27

Sandra Day O'Connor,
The Majesty of the Law (Paperback ed. 2004) 47

William Rawale,
A View of the Constitution of the United States
(2nd ed. 1829), reprinted in
2 The Founders' Constitution
(Phillip B. Kurland & Ralph Lerner, eds.)
(Liberty Fund 2005) 41

Antonin Scalia,
A Matter of Interpretation: Federal Courts & The Law (1997) 46

Dan Schweitzer,
LaPides v. Board of Regents of the University of Georgia System: A Partial Answer to the Sovereign Immunity-Waiver Conundrum,
17 Nat'l Envir. L.J. 3 (Dec. 2002/Jan. 2003) 30

TABLE OF AUTHORITIES – Continued

Page

Joseph Story,
A Familiar Exposition of the Constitution of the United States
(Regnery Gateway 1986) (1840) 41

1 Laurence H. Tribe,
American Constitutional Law (3d ed. 2000) 33

Gary Wills,
A Necessary Evil: A History of American Distrust of Government (1999) 49

BRIEF OF THE PETITIONERS

Central Virginia Community College, Virginia Military Institute, New River Community College, and Blue Ridge Community College (collectively, "the Virginia Institutions"), by and through their counsel, Virginia Attorney General Judith Williams Jagdmann, submit their Brief.[1] For the reasons stated below, the judgment of the United States Court of Appeals for the Sixth Circuit – that Congress may use the Article I Bankruptcy Clause, U.S. Const. art. I, § 8, cl. 4, to abrogate the States' sovereign immunity – should be reversed.[2]

OPINIONS BELOW

The decision of the court of appeals is unpublished, but reported as *Katz v. Central Virginia Community College (In re Wallace's Bookstores)*, 106 Fed. Appx. 341 (6th Cir. 2004)

---

[1] Like all public institutions of higher education in Virginia, the Virginia Institutions are considered the Commonwealth for purposes of sovereign immunity. *See Shepard v. Irving*, 204 F. Supp. 2d 902, 912 (E.D. Va. 2002); *University of Virginia v. Robertson (In re Robertson)*, 243 B.R. 657, 661 n.4 (W.D. Va. 2000) (bankruptcy appeal); *DeBauche v. Virginia Commonwealth Univ.*, 7 F. Supp. 2d 718, 722 (E.D. Va. 1998); *Thorpe v. Virginia State Univ.*, 6 F. Supp. 2d 507, 509 n.4 (E.D. Va. 1998).

[2] Although this proceeding questions the constitutionality of 11 U.S.C. § 106(a), which purports to abrogate the States' sovereign immunity for adversary proceedings in bankruptcy, neither the United States nor any agency, officer, or employee thereof is a party. Because 28 U.S.C. § 2403(a) is applicable, the Virginia Institutions, on two separate occasions, advised the court of appeals that there was a constitutional challenge to a federal statute and that the Attorney General of the United States should be notified of the challenge. Apparently, the Attorney General of the United States was never notified. Moreover, the Virginia Institutions included a Rule 29.4(b) statement in the Petition for Certiorari and served a copy of the Petition on the Solicitor General of the United States.

(*per curiam*). It is reprinted in the Joint Appendix at 46. The decision of the United States District Court for the Eastern District of Kentucky is unpublished and unreported, but is reprinted in the Joint Appendix at 44. The four decisions of the United States Bankruptcy Court for the Eastern District of Kentucky also are unpublished and unreported, but are reprinted in the Joint Appendix at 40 (Central Virginia Community College), 38 (Virginia Military Institute), 36 (New River Community College), and 42 (Blue Ridge Community College).[3] The decision of the Sixth Circuit denying rehearing *en banc* is unpublished and unreported. It is reprinted in the Joint Appendix at 48.

JURISDICTION

The panel decision of the court of appeals was entered on August 4, 2004. The decision of the court of appeals denying the Virginia Institutions' petition for rehearing *en banc* was entered on September 30, 2004.[4] This Court has jurisdiction under 28 U.S.C. § 1254(1). A Writ of Certiorari was granted on April 4, 2005. *See* 125 S. Ct. 1727 (2005).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

This petition involves the following constitutional and statutory provisions:

[3] In the bankruptcy court, there were four separate cases – one against each of the institutions. The four appeals were consolidated in the district court and taken as one appeal to the court of appeals. The Virginia Institutions filed one Petition for a Writ of Certiorari.

[4] The court of appeals stayed its mandate pending this Court's resolution of the Petition.

1. The Bankruptcy Clause of the United States Constitution, Art. I, § 8, cl. 4, states that the Congress shall have the power: "To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."

2. The Tenth Amendment to the United States Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

3. The Eleventh Amendment to the United States Constitution provides: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state. . . ."

4. The federal statute at issue in this petition, 11 U.S.C. § 106(a), provides:

> (a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:
>
> Sections 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 728, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this title.
>
> The court may hear and determine any issue arising with respect to the application of such sections to governmental units.
>
> The court may issue against a governmental unit an order, process, or judgment under

such sections or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery, but not including an award of punitive damages. Such order or judgment for costs or fees under this title or the Federal Rules of Bankruptcy Procedure against any governmental unit shall be consistent with the provisions and limitations of section 2412(d)(2)(A) of title 28.

The enforcement of any such order, process, or judgment against any governmental unit shall be consistent with appropriate nonbankruptcy law applicable to such governmental unit and, in the case of a money judgment against the United States, shall be paid as if it is a judgment rendered by a district court of the United States.

Nothing in this section shall create any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law.

INTRODUCTION

In *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), this Court, reaffirming the principles of *Hans v. Louisiana*, 134 U.S. 1 (1890) and explicitly overruling *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989), held that "Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." *Seminole Tribe*, 517 U.S. at 73.[5]

[5] In subsequent decisions, this Court has repeatedly emphasized that "Congress lacks power under Article I to abrogate the States' sovereign immunity." *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 78

(Continued on following page)

Because the Bankruptcy Clause is an Article I power, "Congress may not abrogate the States' Eleventh Amendment immunity by enacting a statute under the Bankruptcy Clause. . . ." *Hoffman v. Connecticut Dep't of Income Maint.*, 492 U.S. 96, 105 (1989) (O'Connor, J., concurring).[6] Indeed, "it has not been widely thought that the federal antitrust, bankruptcy, or copyright statutes abrogated the States' sovereign immunity. This Court never has awarded relief against a State under any of those statutory schemes." *Seminole Tribe*, 517 U.S. at 73 n.16.[7]

(2000). *See also Board of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 364 (2001) ("Congress may not . . . base its abrogation of the States' Eleventh Amendment immunity upon the powers enumerated in Article I."); *Kimel*, 528 U.S. at 80 ("Congress' powers under Article I of the Constitution do not include the power to subject States to suit at the hands of private individuals."); *Alden v. Maine*, 527 U.S. 706, 748 (1999) ("[I]t is settled doctrine that neither substantive federal law nor attempted congressional abrogation under Article I bars a State from raising a constitutional defense of sovereign immunity in federal court. . . ."); *Florida Prepaid Postsecondary Education Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 636 (1999) ("Congress may not abrogate state sovereign immunity pursuant to its Article I powers. . . .").

[6] Individual Justices have expressed similar sentiments. *See Tennessee Student Assistance Corp. v. Hood*, 124 S. Ct. 1905, 1920 (2004) (*Hood II*), 124 S. Ct. at 1920 (Thomas, J., joined by Scalia, J., dissenting) ("This Court has repeatedly stated that 'Congress may not . . . base its abrogation of the States' Eleventh Amendment immunity upon the powers enumerated in Article I.' "); *Hoffman*, 492 U.S. at 105 (Scalia, J., concurring) (stating his belief that Congress should not be able to use any of its Article I powers to abrogate sovereign immunity); *Union Gas Co.*, 491 U.S. at 42 (Scalia, J., joined by Rehnquist, C.J., O'Connor & Kennedy, JJ., dissenting) ("[I]f the Article I commerce power enables abrogation of state sovereign immunity, so do all the other Article I powers. An interpretation of the original Constitution which permits Congress to eliminate sovereign immunity only if it wants to renders the doctrine a practical nullity and is therefore unreasonable.").

[7] Moreover, one of this Court's first applications of *Seminole Tribe* involved bankruptcy. After the Seventh Circuit held that Congress

(Continued on following page)

Relying on the logic of *Seminole Tribe*, *six* courts of appeals have held that Congress may not use the Article I Bankruptcy Clause to abrogate sovereign immunity. *See Georgia Higher Education Assistance Corp. v. Crow (In re Crow)*, 394 F.3d 918, 921-22 (11th Cir. 2004); *Nelson v. La Crosse County Dist. Attorney (In re Nelson)*, 301 F.3d 820, 832 (7th Cir. 2002); *Mitchell v. Franchise Tax Bd. (In re Mitchell)*, 209 F.3d 1111, 1121 (9th Cir. 2000); *Sacred Heart Hosp. v. Department of Pub. Welfare (In re Sacred Heart Hosp.)*, 133 F.3d 237, 243 (3rd Cir. 1998); *Fernandez v. PNL Asset Mgmt. Co. LLC (In re Fernandez)*, 123 F.3d 241, 243 (5th Cir.), *amended by* 130 F.3d 1138, 1139 (5th Cir. 1997); *Schlossberg v. Maryland (In re Creative Goldsmiths)*, 119 F.3d 1140, 1145-46 (4th Cir. 1997). However, the Sixth Circuit, relying in part on an analysis rejected by *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 n.2 (1985), concluded that Congress may use the Article I Bankruptcy Clause to abrogate sovereign immunity. *See Hood v. Tennessee Student Assistance Corp. (In re Hood)*, 319 F.3d 755, 764-68 (6th Cir. 2003) (*Hood I*).[8] In this case, the Sixth Circuit, relying

---

could use the Article I Bankruptcy Clause to abrogate sovereign immunity, this Court granted certiorari, vacated the judgment and remanded for further proceedings in light of *Seminole Tribe*. *See Ohio Agric. Commodity Depositors Fund v. Mahern (In re Merchants Grain)*, 59 F.3d 630 (7th Cir. 1995), *cert. granted, judgment vacated, and remanded*, 517 U.S. 1130 (1996). Ultimately, that case became moot before the Seventh Circuit could render a decision on remand. However, the Seventh Circuit subsequently held that Congress may not use the Article I Bankruptcy Clause to abrogate sovereign immunity. *Nelson*, 301 F.3d 820.

[8] Although this Court agreed to review *Hood I* in order "to decide whether Congress has the authority to abrogate state sovereign immunity under the Bankruptcy Clause," *Hood II*, 124 S. Ct. at 1915 (Thomas, J., joined by Scalia, J., dissenting), this Court ultimately decided the case on other grounds (*in rem* jurisdiction) and, thus, declined "to decide whether a bankruptcy court's exercise of personal

(Continued on following page)

exclusively on its previous decision in *Hood I*, reached the same conclusion.[9] J.A. at 46. Because the lower court's decision is contrary to the well-established principles of *Seminole Tribe*, the judgment should be reversed.

STATEMENT OF THE CASE

1. The factual and procedural background for this matter is relatively straightforward. Wallace's Bookstores, Inc., a Kentucky corporation, operated college and university bookstores in a number of States. Each of the four Virginia Institutions did business with the company prior to it declaring bankruptcy. After commencement of the bankruptcy proceeding, the Respondent, Bernard Katz, who is the Liquidating Supervisor of the bankrupt estate, commenced four different adversary proceedings – one against each of the Virginia Institutions.

These adversary proceedings involve three different types of actions. First, pursuant to 11 U.S.C. §§ 547 and 550, Katz seeks to recover alleged preferential transfers.[10]

---

jurisdiction over a State would be valid under the Eleventh Amendment." *Id.* at 1915 (Opinion of Court).

[9] Because this Court, in deciding *Hood II*, never addressed the correctness of the Sixth Circuit's rationale in *Hood I*, the reasoning of *Hood I* remains binding precedent in the Sixth Circuit. *See Moltan Co. v. Eagle-Picher Indus., Inc.*, 55 F.3d 1171, 1176 (6th Cir. 1995) ("We cannot overturn the prior published opinion of another panel and are therefore bound by these previous decisions."). As a result, the three-judge panel of the lower court had no choice but to follow *Hood I* and summarily affirm.

[10] Originally, Katz, acting pursuant to 11 U.S.C. §§ 544 and 550, also sought to recover preferential transfers allegedly made in violation of Kentucky law. However, Katz voluntarily dismissed these claims with prejudice after this Court granted certiorari. Because there continues to be a live case or controversy between Katz and the Virginia Institutions,

(Continued on following page)

Essentially, Katz is attempting to recover money that indisputably belongs to the Virginia Institutions. Second, Katz seeks to recover accounts receivable that are allegedly owed because of agreements between the debtor and the Virginia Institutions. In other words, Katz is attempting to recover money for an alleged breach of contract claim. Third, pursuant to 11 U.S.C. § 502, Katz seeks to have any pre-petition claims of the Virginia Institutions disallowed. In effect, Katz is attempting to stop the Virginia Institutions from collecting money that is owed to them.

Specifically, Katz seeks a total of $356,174.79[11] from the Virginia Institutions – $68,285.00 from Central Virginia Community College,[12] $56,004.00 from Virginia Military Institute,[13] $162,513.61 from New River Community College,[14] and $69,372.18 from Blue Ridge Community College.[15] *See* J.A. at 14, ¶ 15; J.A. at 15, ¶ 24 (Central Virginia Community College); J.A. at 5, ¶ 15; J.A. at 6, ¶ 24 (Virginia

---

the dismissal of these claims does not affect this Court's jurisdiction nor the need for this Court to resolve the question presented.

[11] This total reflects $167,874.21 in receivables and $188,300.58 in alleged preferential transfers.

[12] This total reflects $4,898.00 in receivables and $63,387.00 in alleged preferential transfers.

[13] This total reflects $30,409.00 in receivables and $25,595.00 in alleged preferential transfers. Originally, Katz sought $77,654.00 in alleged preferential transfers. *See* J.A. at 7, ¶ 33. However, after Katz dismissed his state law preference claims, the amount was reduced to $25,595.00. *See* J.A. at 6, ¶ 24.

[14] This total reflects $97,249.61 in receivables and $65,264.00 in alleged preferential transfers.

[15] This total reflects $35,317.60 in receivables and $34,054.58 in alleged preferential transfers. Originally, Katz sought $35,312.50 in alleged preferential transfers. *See* J.A. at 24, ¶ 34. However, after Katz dismissed his state law preference claims, the amount was reduced to $34,054.58. *See* J.A. at 23, ¶ 26.

Military Institute); J.A. at 31, ¶ 19; J.A. at 33, ¶ 28 (New River Community College); J.A. at 22, ¶ 17; J.A at 23, ¶ 26 (Blue Ridge Community College). Katz alleges that the preferential transfers were purportedly made by the debtor pursuant to separate agreements with each of the institutions. *See* J.A. at 15, ¶ 24 (Central Virginia Community College); J.A. at 6, ¶ 24 (Virginia Military Institute); J.A. at 33, ¶ 28 (New River Community College); J.A. at 23, ¶ 26 (Blue Ridge Community College). The four adversary complaints also allege that the Virginia Institutions, as unsecured creditors, each should be denied the right to any distribution from the bankruptcy estate on any proof of claim they might have filed. *See* J.A. at 16, ¶ 33 (Central Virginia Community College); J.A. at 9, ¶ 42 (Virginia Military Institute); J.A. at 34, ¶ 37 (New River Community College); J.A. at 26, ¶ 43 (Blue Ridge Community College).

2. The Virginia Institutions moved to dismiss all of the adversary proceedings on sovereign immunity grounds. However, the bankruptcy court, following *Hood I*, denied the Motion to Dismiss.[16] *See* J.A. at 40-41 (Central Virginia Community College); J.A. at 38-39 (Virginia Military Institute); J.A. at 36-37 (New River Community College); J.A. at 42-43 (Blue Ridge Community College).

---

[16] Additionally, Katz argued that Virginia Military Institute had waived sovereign immunity by filing for all $56,004.00 in claims against it by filing a proof of claim for $43,237.60. Initially, the bankruptcy court accepted this argument and included waiver as an alternative grounds for denying Virginia Military Institute's Motion to Dismiss. *See* Order of April 24, 2003 at ¶ 3, *Katz v. Virginia Military Institute* (*In re Wallace's Bookstores*) (Bkr. E.D. Ky.) (No. 03-05068). However, in its final order concerning Virginia Military Institute, the bankruptcy court did not mention waiver of sovereign immunity, but relied exclusively on abrogation of sovereign immunity. *See* J.A. at 38-39.

3. Because a denial of sovereign immunity is a final judgment under the collateral order doctrine, *see Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U. S. 139, 141-45 (1993), the Virginia Institutions appealed to the district court. The district court, following *Hood I*, held that sovereign immunity had been abrogated. J.A. at 44-45.

4. The Virginia Institutions appealed to the court of appeals. The Sixth Circuit apparently delayed resolution of the appeal until after this Court decided *Hood II*. Once this Court rendered its decision without resolving whether Congress could use the Bankruptcy Clause to abrogate sovereign immunity, *Hood II*, 124 S. Ct. at 1915, the court of appeals applied its decision in *Hood I* and affirmed. J.A. at 46-47. The court of appeals denied the Virginia Institutions' petition for rehearing *en banc*. J.A. at 48-49.

5. Because the sole basis for the lower court's decision was its previous decision in *Hood I*, this Court is, for all practical purposes, reviewing the correctness of the holding in *Hood I*. Thus, it is appropriate to review briefly the Sixth Circuit's rationale for holding that Congress may use the Bankruptcy Clause to abrogate sovereign immunity. In concluding that Congress may use the Article I Bankruptcy Clause to abrogate sovereign immunity, the court of appeals made three points.

a. First, unlike the Third, Fourth, Fifth, Seventh, Ninth, and Eleventh Circuits, the Sixth Circuit interpreted *Seminole Tribe* as leaving open the possibility that Congress could use *some* of its Article I powers to abrogate sovereign immunity. *Hood I*, 319 F.3d at 761-62. *See also Hood II*, 124 S. Ct. at 1920 (Thomas, J., joined by Scalia, J., dissenting) ("[T]he Court of Appeals held that the Bankruptcy Clause operates differently than Congress' other Article I powers because of its 'uniformity requirement.'"). Instead, the Sixth Circuit

declared that "neither *Seminole Tribe* nor any of the Supreme Court's other recent sovereign immunity cases address Congress's Bankruptcy Clause powers as understood in the plan of the Convention." *Hood I*, 319 F.3d at 761-62.

b. Second, the Sixth Circuit found the text of the Bankruptcy Clause to be significant. Unlike the other Article I powers, the Bankruptcy Clause requires that there be "uniform laws." *See* U.S. Const. art. I, § 8, cl. 4 ("To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."). Although every other Circuit to address the issue has found this Uniformity Requirement to be limited to a requirement of "geographic uniformity," *see Crow*, 394 F.3d at 922; *Nelson*, 301 F.3d at 834; *Mitchell*, 209 F.3d at 119; *Sacred Heart*, 133 F.3d at 243; *Fernandez*, 123 F.3d at 244; *Schlossberg*, 119 F.3d at 1145-46, the court of appeals rejected this interpretation. *Hood I* at 763-64. Instead, the Sixth Circuit found that the Uniformity Requirement was more than a mere legislative preference; it was a constitutional mandate. *See Id.* at 764-67. In the lower court's view, "a federal bankruptcy system could cure the previous systems' ills only if it applied uniformly to all creditors and debtors. . . ." *Id.* at 767.

c. Third, the Sixth Circuit adopted the rationale of the four-Justice dissent in *Atascadero* and the four-Justice plurality in *Union Gas*. To explain, in his dissent in *Atascadero*, Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, focused on Hamilton's *The Federalist No. 81*, which had long been interpreted as supporting the proposition that the States retained sovereign immunity after the Constitution was adopted. Justice Brennan argued that a closer examination of *The Federalist No. 81*, and particularly in cross-reference to Hamilton's *The Federalist No. 32*, showed that Hamilton agreed that a surrender of the sovereign power to

legislate inevitably resulted in a surrender of sovereign immunity. *See Atascadero*, 473 U.S. at 276-78 (Brennan, J., joined by Marshall, Blackmun, & Stevens, JJ., dissenting).[17] Four years later, in *Union Gas,* the same four Justices reiterated their belief that the surrender of sovereign authority to legislate necessarily included a surrender of sovereign immunity from suit. *See Union Gas,* 491 U.S. at 19-20 (Brennan, J., joined by Marshall, Blackmun, & Stevens, JJ., announcing the judgment of the Court).[18] In *Hood I*, the court

[17] As the dissenting Justices explained:

> A careful reading of this passage, however, in the context of Hamilton's views elsewhere in *The Federalist*, demonstrates precisely the opposite. In the cases arising under state law that would find their way into federal court under the state citizen diversity clause, a defense of state sovereign immunity would be as valid in federal court as it would be in state court. The States retained their full sovereign authority over state-created causes of action, as they did over their traditional sources of revenue. *See The Federalist No. 32* (discussing taxation). On the other hand, where the Federal Government, in the "plan of the convention," had substantive lawmaking authority, the States no longer retained their full sovereignty and could be subject to suit in federal court. In these areas, in which the Federal Government had substantive lawmaking authority, Article III's federal-question grant of jurisdiction gave the federal courts power that extended just as far as the legislative power of Congress; as Hamilton had said in discussing the judicial power, "every government *ought to possess the means of executing its own provisions by its own authority*," *The Federalist No. 80* (emphasis in original). To interpret Article III to impose an independent limit on the lawmaking power of Congress would be to turn the "plan of the convention" on its head.

Atascadero, 473 U.S. at 276-78 (footnotes and some citations omitted) (Brennan, J., joined by Marshall, Blackmun, & Stevens, JJ., dissenting).

[18] The plurality observed:

> We have recognized that the States enjoy no immunity where there has been "'a surrender of this immunity in the

(Continued on following page)

of appeals, without noting or acknowledging the four-Justice *Atascadero* dissent or the four-Justice *Union Gas* plurality, essentially adopted the same reasoning. *Hood I*, 319 F.3d at 766. The court of appeals observed:

> The question is whether Hamilton's identification of the uniform powers as examples of categories in which states have ceded sovereignty includes the ceding of immunity from suit. We conclude that *No. 32* does in fact refer to the ceding of sovereign immunity. Hamilton's cross-reference to this discussion in *No. 81*'s discussion of ceding sovereign immunity can *only* suggest that, in the minds of the Framers, ceding sovereignty by the methods described in *No. 32* implies ceding sovereign immunity as discussed in *No. 81*. There is no other explanation for his cross-reference in *No. 81*. Thus *The Federalist No. 81* and *No. 32* suggest that the states ceded their immunity by granting Congress the power to make uniform laws.

Hood I, 319 F.3d at 766 (citations omitted) (emphasis added). The lower court was adopting a rationale that had

> plan of the convention.'" Because the Commerce Clause withholds power from the States at the same time as it confers it on Congress, and because the congressional power thus conferred would be incomplete without the authority to render States liable in damages, it must be that, to the extent that the States gave Congress the authority to regulate commerce, they also relinquished their immunity where Congress found it necessary, in exercising this authority, to render them liable. The States held liable under such a congressional enactment are thus not "unconsenting"; they gave their consent all at once, in ratifying the Constitution containing the Commerce Clause, rather than on a case-by-case basis.

Union Gas, 491 U.S. at 19-20 (Brennan, J., joined by Marshall, Blackmun, & Stevens, JJ., announcing the judgment of the Court) (citations omitted).

been rejected in *Atascadero* and *Seminole Tribe*. *See Seminole Tribe*, 517 U.S. at 65-66 (overruling *Union Gas*); *Atascadero*, 473 U.S. at 238-39 n.2 (rejecting the position set forth by the four-Justice dissent). Based on that rationale, the court of appeals held that by surrendering the sovereign power to make uniform bankruptcy laws, the States necessarily surrendered their sovereign immunity. Thus, because Congress can pass bankruptcy laws, it can abrogate the States' sovereign immunity for suits arising out of bankruptcy.

SUMMARY OF ARGUMENT

The Virginia Institutions' argument for reversal of the Sixth Circuit's Judgment is straightforward.

First, Congress may not use the Article I Bankruptcy Clause to abrogate the States' sovereign immunity. This conclusion flows from well-established constitutional principles. The Constitution creates dual sovereigns – the National Government and the States. As a consequence of being sovereign, the States are immune from suit. Although Congress may abrogate the States' sovereign immunity, the abrogation exception is limited to enforcement of the Fourteenth Amendment. The abrogation exception does not extend to the general Article I powers, such as the Bankruptcy Clause. Because sovereign immunity has not been validly abrogated, the Virginia Institutions are immune.

Second, the Uniformity Requirement does not alter the analysis. Initially, the Uniformity Requirement does not require that all debtors and creditors be treated alike or that the States be treated like private parties. Congress may create different classes of debtors and may acknowledge that similar transactions have different consequences in different States. Additionally, a need for national uniformity does not trump the States' sovereign immunity.

While there is a need for uniformity with respect to intellectual property and some aspects of commerce, neither the commerce power nor the intellectual property power can be used to diminish the States' sovereign immunity. Furthermore, the Uniformity Requirement actually limits, rather than expands, powers of Congress. The other Article I powers are not subject to a requirement of uniformity. Although the "Dormant Commerce Clause" prohibits the States from regulating interstate commerce in the absence of congressional action, there is no "Dormant Bankruptcy Clause." Thus, the Bankruptcy Clause power is narrower than the other Article I powers – an interpretation which is confirmed by the historical record.

Third, Hamilton's writings do not alter the analysis. Contrary to the lower court's interpretation, Hamilton believed that the sovereign power to legislate was separate and distinct from the sovereign immunity from suit. Additionally, regardless of what Hamilton believed, his writings are not dispositive. The overwhelming national consensus – as con-firmed by the rapid adoption of the Eleventh Amendment – was that the States were immune from suit. Finally, acceptance of the lower court's rationale would transform this Court's dual sovereignty jurisprudence. It would require not only overruling *Seminole Tribe*, but also overruling *Hans*. Such a development would cast serious doubt on the viability of dual sovereignty decisions outside of the immunity context.

ARGUMENT

I. CONGRESS MAY NOT USE THE ARTICLE I BANKRUPTCY CLAUSE TO ABROGATE SOVEREIGN IMMUNITY.

"Even when the Constitution vests in Congress complete law-making authority over a particular area, the

Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States." *Seminole Tribe*, 517 U.S. at 72. Thus, while the Bankruptcy Clause allows Congress to make uniform bankruptcy laws, it does not allow Congress to abrogate the States' sovereign immunity.

This conclusion logically flows from basic constitutional principles. First, the Constitution establishes dual sovereigns – the States and the National Government – each of which exercises sovereign power in their respective sphere without interference from the other. *See* U.S. Const. amend. X. Second, one consequence of the States being sovereign is that they retain sovereign immunity from suit. *See* U.S. Const. amend XI. Third, while Congress may abrogate the States' sovereign immunity in extraordinary circumstances, this exception is limited to circumstances in which Congress is enforcing the Fourteenth Amendment. The abrogation exception does not extend to the general Article I powers, such as the Bankruptcy Clause.

A. The Constitution Creates Dual Sovereigns.

The Constitution "split the atom of sovereignty" by "establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it." *U.S. Term Limits v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).[19] By dividing

[19] Justice Kennedy's idea of dividing power between dual sovereigns is not new. As early as 1768, John Dickinson suggested that sovereignty should be divided between the British Parliament and the Colonial Legislatures. *See* 1 Alfred H. Kelly, Winfred A. Harbison & Herman Belz, *The American Constitution: Its Origins and Development* 46-49 (7th ed. 1991).

sovereignty between the National Government and the States,[20] the Constitution insured that "a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself." *The Federalist No. 51*, at 291 (James Madison). *See also The Federalist No. 28*, at 149 (Alexander Hamilton) ("Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government.").[21] Thus, "the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1868).

This division of sovereignty between the States and the National Government "is a defining feature of our Nation's constitutional blueprint." *Federal Maritime*

[20] Prior to the adoption of the Constitution, the thirteen States effectively were thirteen sovereign nations. *See Declaration of Independence* ("these United colonies are and of right ought to be free and independent states"). Each individual State retained the "Full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do." *Id.* Indeed, the Articles of Confederation explicitly recognized that each State "retains its sovereignty, freedom, and independence, which is not by this confederation expressly delegated to the United States, in Congress assembled." *Articles of Confederation*, art. II. In sum, before the ratification of the United States Constitution, the States were sovereign entities. *See Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991).

[21] Throughout this Brief, all page number citations to *The Federalist* are from *The Federalist Papers* (Clinton Rossiter, ed. 1961, Mentor Books Edition 1999).

Comm'n v. South Carolina State Ports Auth., 535 U.S. 743, 751 (2002). It "protects us from our own best intentions" by preventing the concentration of "power in one location as an expedient solution to the crisis of the day." *New York v. United States*, 505 U.S. 144, 187 (1992). The division of power between *dual sovereigns*, the States and the National Government, is reflected throughout the Constitution's text, *see Printz v. United States*, 521 U.S. 898, 919 (1997), as well as its structure. *See Alden*, 527 U.S. at 714-15. "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

Because "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom," *United States v. Lopez*, 514 U.S. 549, 578 (1995) (Kennedy, J., joined by O'Connor, J., concurring), this Court has intervened to maintain the prerogatives of both the States and the National Government.[22] In order to

[22] Moreover, this Court has reinforced the division of power among the Sovereigns by insisting that "if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Will v. Michigan State Police*, 491 U.S. 58, 65 (1989) (internal quotation marks omitted). *See also Gregory*, 501 U.S. at 460-61 (clear statement required to dictate qualifications for state officials); *Atascadero*, 473 U.S. at 242 (no abrogation of sovereign immunity without clear statement); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 16 (1981) (clear statement required to impose conditions on the receipt of federal funds). In other words, the sovereignty of the States is far too important to be undermined by inference or implication. Rather, the sovereignty of the States can only be diminished by a clear expression of congressional intent within the statutory text.

preserve the sovereignty of the National Government, this Court has prevented the States from imposing term limits on members of Congress, *U.S. Term Limits*, 514 U.S. at 800-01, and instructing members of Congress as to how to vote on certain issues, *Cook v. Gralike*, 531 U.S. 510, 519-22, (2001). Similarly, it has invalidated state laws that infringe on the right to travel, *Saenz v. Roe*, 526 U.S. 489 (1999), that undermine the Nation's foreign policy, *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372-74 (2000), and that exempt a State from generally applicable regulations of interstate commerce. *Reno v. Condon*, 528 U.S. 141, 150 (2000). Conversely, in order to preserve the sovereignty of the States, this Court has prevented the National Government from requiring the States to pass particular legislation, *New York*, 505 U.S. at 162, commandeering state and local officials to enforce federal law, *Printz*, 521 U.S. at 935, dictating the location of the State Capitol, *Coyle v. Smith*, 221 U.S. 559, 579 (1911), or regulating purely local matters under the guise of interstate commerce. *United States v. Morrison*, 529 U.S. 598, 617-19 (2000); *Lopez*, 514 U.S. at 561 n.3.

B. The States Have Immunity From Suit.

"An integral component of that 'residuary and inviolable sovereignty' retained by the States is their immunity from private suits." *Federal Maritime Comm'n*, 535 U.S. at 751. *See also The Federalist No. 39*, at 213 (James Madison) ("the proposed government cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects."); *No. 81*, at 455 (Alexander Hamilton) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent.*") (emphasis

original). The adoption of the Constitution "did not disturb States' immunity from private suits, thus firmly enshrining this principle in our constitutional framework." *Federal Maritime Comm'n*, 535 U.S. at 752. Indeed, "leading advocates of the Constitution assured the people in no uncertain terms that the Constitution would not strip the States of sovereign immunity." *Alden*, 527 U.S. at 716.

The widespread acceptance of this proposition is demonstrated by the reaction to *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), which held that private citizens from one State could sue another State.[23] *Id.* at 468 (Cushing, J.); 440 (Wilson, J.); 478-79 (Jay, C.J.); 450-53 (Blair, J.). Almost immediately, Congress passed and the States subsequently ratified the Eleventh Amendment, which effectively overturns *Chisholm*. *See Federal Maritime Comm'n*, 535 U.S. at 752; *Alden*, 527 U.S. at 721. While the text of the Eleventh Amendment is limited to "the specific provisions of the Constitution that had raised concerns during the ratification debates and formed the basis of the *Chisholm* decision," *Id.* at 723, the Eleventh Amendment confirms a much broader proposition – the States are immune from suit.[24] *Hans*, 134 U.S. at 15 (Federal jurisdiction over suits against unconsenting States "was not contemplated by the Constitution when

[23] This Court has explicitly acknowledged that *Chisholm* was wrong. *See Federal Maritime Comm'n*, 535 U.S. at 752-53; *Alden*, 527 U.S. at 721-22.

[24] The Eleventh Amendment does not exist solely in order to "preven[t] federal-court judgments that must be paid out of a State's treasury," *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 48 (1994). It also serves to avoid "the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *Puerto Rico Aqueduct and Sewer Auth.*, 506 U.S. at 146 (internal quotation marks omitted).

establishing the judicial power of the United States."). *Cf. Puerto Rico Aqueduct and Sewer Auth.* 506 U.S. at 146 ("The Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity."); *Blatchford*, 501 U.S. at 779 ("[W]e have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms. . . ."). "Although the sovereign immunity of the States derives at least in part from the common-law tradition, the structure and history of the Constitution make clear that the immunity exists today by constitutional design." *Alden*, 527 U.S. at 733.

Thus, the immunity confirmed by the Eleventh Amendment bars suits against the States by Indian Tribes, *Blatchford*, 501 U.S. at 782, foreign nations, *Principality of Monaco v. Mississippi*, 292 U.S. 313, 330-32 (1934), and corporations created by the National Government. *Smith v. Reeves*, 178 U.S. 436, 446, 449 (1900). Moreover, it applies to proceedings in state court, *Alden*, 527 U.S. at 712, in federal administrative proceedings, *Federal Maritime Comm'n*, 535 U.S. at 760, in admiralty, *In re New York*, 256 U.S. 490, 503 (1921), and in situations where the State's treasury is not implicated. *See Doe v. Regents of the Univ. of California*, 519 U.S. 425, 431 (1997). Indeed, there is a presumption "that the Constitution was not intended to 'rais[e] up' any proceedings against the States that were 'anomalous and unheard of when the Constitution was adopted.'" *Federal Maritime Comm'n*, 535 U.S. at 755 (quoting *Hans*, 134 U.S. at 18).

Yet, while sovereign immunity is quite broad, it is not absolute. There are five exceptions. First, the "States, in ratifying the Constitution, did surrender a portion of their

inherent immunity by consenting to suits brought by sister States or by the Federal Government." *Federal Maritime Comm'n*, 535 U.S. at 752. *See also Virginia v. Maryland*, 540 U.S. 56 (2003) (State against State); *Chao v. Virginia Dep't of Transp.*, 291 F.3d 276 (4th Cir. 2002) (National Government against State). Second, when a State invokes the jurisdiction of a federal court, it exposes itself to the equivalent of a compulsory counterclaim that does not exceed in amount or differ in kind from the relief sought by the State.[25] *See Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe*, 498 U.S. 505, 509 (1991);[26] *United States Fidelity & Guaranty Co.*, 309 U.S. at 511-12; *United States v. Shaw*, 309 U.S. 495, 501-02 (1940).[27] Third,

[25] Thus, where the State initiates a suit for injunctive relief, a counter-claim or cross-claim for damages is barred. *Potawatomi Tribe*, 498 U.S. at 509; *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 513 (1940). In other words, the initiation of litigation did not create a broad waiver, *see Potawatomi Tribe*, 498 U.S. at 509. Rather, the filing of a claim merely allows the adjudication of *that* claim. *See Gardner v. New Jersey*, 329 U.S. 565, 574 (1947). Consequently, where a sovereign brings an action for damages, any counterclaim seeking an amount of damages greater than the amount originally sought by the State, even with respect to a mandatory counterclaim, is barred by sovereign immunity. *Shaw*, 309 U.S. at 501. Therefore, if a state agency files a proof of claim in bankruptcy, any resulting waiver logically is limited to the amount of the proof of claim.

[26] While *Potawatomi Tribe* involved a suit initiated by an Indian Tribe rather than a State, the same principles are equally applicable to the States. *See Kiowa Tribe of Oklahoma v. Manufacturing Techs., Inc.*, 523 U.S. 751, 756 (1998) (tribal immunity akin to that of other governments until abrogated).

[27] Although *United States Fidelity & Guaranty Co.* and *Shaw* involved suits initiated by the National Government rather than a State, "it cannot be doubted that the question whether a . . . suit is one against the State . . . must depend upon the same principles that determine whether a . . . suit is one against the United States." *Tindal v. Wesley*, 167 U.S. 204, 213 (1897). *See also California v. Deep Sea Research, Inc.*, 523 U.S. 491, 506-07 (1998) ("In considering whether the

(Continued on following page)

under the terms of the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908), federal courts generally may enjoin state officers, in their official capacities, to conform their conduct to federal law.[28] *See Frew v. Hawkins*, 124 S. Ct. 899, 903 (2004); *Quern v. Jordan*, 440 U.S. 332, 337 (1979). Fourth, a State may waive its sovereign immunity.[29]

Eleventh Amendment applies . . . , this Court's decisions in cases involving the sovereign immunity of the Federal Government . . . provide guidance, for this Court has recognized a correlation between sovereign immunity principles applicable to States and the Federal Government.").

[28] In essence, the *Ex Parte Young* doctrine insures "that the doctrine of sovereign immunity remains meaningful, while also giving recognition to the need to prevent violations of federal law." *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 269 (1997). Yet "[t]he real interests served by [sovereign immunity] are not to be sacrificed to elementary mechanics of captions and pleading. Application of the *Ex Parte Young* exception must reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflexive reliance on an obvious fiction." *Id.* at 270 (citations omitted). Thus, this Court has recognized two exceptions to the doctrine. First, the doctrine is inapplicable in those situations where Congress has enacted a comprehensive "remedial scheme." *Seminole Tribe*, 517 U.S. at 71-75. Second, the *Ex Parte Young* doctrine was inapplicable when there are "special sovereignty interests" involved. *Coeur d'Alene Tribe*, 521 U.S. at 287-88.

[29] However, such waivers must be express. There are no constructive waivers of sovereign immunity. *College Sav. Bank*, 527 U.S. at 681-84. *See also United States v. King*, 395 U.S. 1, 4 (1969) (describing the "settled propositio[n]" that the United States' waiver of sovereign immunity "cannot be implied but must be unequivocally expressed"). Thus, receipt of federal funds, general participation in a federal program, or an agreement to recognize and abide by federal laws, regulations, and guidelines alone are insufficient to waive sovereign immunity. *See Atascadero*, 473 U.S. at 246-47.

Moreover, express waivers of sovereign immunity will be found "only where stated 'by the most expressive language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'" *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (citation omitted). Thus, a State does not consent to suit in federal court by merely consenting to suit in the courts of its own

(Continued on following page)

College Sav. Bank v. Florida Prepaid Postsecondary Education Expense Bd., 527 U.S. 666, 670 (1999). Finally, in extraordinary circumstances, Congress may abrogate the States' sovereign immunity. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

It is this last exception – the ability of Congress to abrogate sovereign immunity – that is central to this case. Congress, acting pursuant to the Bankruptcy Clause, has attempted to abrogate the States' sovereign immunity for certain causes of action that may arise only in bankruptcy. *See* 11 U.S.C. § 106(a). The constitutionality of that attempt at abrogation is at issue in this case.

C. The Abrogation Exception Is Limited To Circumstances Where Congress Is Enforcing the Fourteenth Amendment.

Quite simply, Congress' ability to abrogate sovereign immunity depends upon the constitutional power that Congress purports to use. *Kimel*, 528 U.S. at 78-80. "Congress' powers under Article I of the Constitution do not include the power to subject States to suit at the hands of private individuals." *Id.* at 80. "Section 5 of the Fourteenth Amendment, however, does grant Congress the authority

---

creation. *Smith v. Reeves*, 178 U.S. 436, 441-45 (1900). Nor does it consent to suit in federal court by merely stating its intention to "sue and be sued," *Florida Department of Health and Rehabilitative Services v. Florida Nursing Home Association*, 450 U.S. 147, 149-50 (1981) (*per curiam*), or even by authorizing suits against it "in any court of competent jurisdiction." *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 577-79 (1946). "Although a State's general waiver of sovereign immunity may subject it to suit in state court, it is not enough to waive the immunity guaranteed by the Eleventh Amendment . . . [absent] intent to subject itself to suit in federal court." *Atascadero*, 473 U.S. at 241 (citations omitted).

to abrogate the States' sovereign immunity." *Id.* This distinction between the Article I powers and the Fourteenth Amendment enforcement powers stems from the fundamentally different purposes of these two portions of the Constitution.

The Article I powers define and limit the National Government to preserve the sovereignty of the States. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) ("The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written."). *See also* Akhil Reed Amar, *The Bill of Rights* (1998) (arguing that the Bill of Rights originally was intended, in part, to protect the States from abuses by the National Government). Indeed, "the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States." *New York*, 505 U.S. at 156-57. "The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." *Seminole Tribe*, 517 U.S. at 73. Because the Tenth and Eleventh Amendments confirm the limited nature of the Article I powers, "Congress lacks power under Article I to abrogate the States' sovereign immunity."[30]

---

[30] Moreover, Congress may not use its Article I powers to exact an express waiver of sovereign immunity or otherwise diminish the States' sovereign immunity. *See College Sav. Bank*, 527 U.S. at 683 ("Recognizing a congressional power to exact constructive waivers of sovereign immunity through the exercise of Article I powers would also, as a practical matter, permit Congress to circumvent the antiabrogation holding of *Seminole Tribe*."). Consequently, although Congress has attempted to declare that the filing of a proof of claim constitutes waiver, 11 U.S.C. § 106(b), that provision is suspect. *See Schlossberg*, 119 F.3d at 1147 ("While 11 U.S.C. § 106(b) may correctly describe those

(Continued on following page)

Kimel, 528 U.S. at 78. "Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States." *Seminole Tribe*, 517 U.S. at 72.

In contrast, the Fourteenth Amendment diminishes the States' sovereign authority while enhancing the power of the National Government.[31] First, both the Equal Protection Clause and Privileges or Immunities Clause imposed substantive restrictions on the States. *See Johnson v. California*, 125 S. Ct. 1141, 1146 (2005) (Equal Protection); *Saenz*, 526 U.S. at 503-04 (Privileges or Immunities). Moreover, although the Bill of Rights originally did not apply to the States, *Barron v. Mayor of*

actions that, as a matter of constitutional law, constitute a state's waiver of the Eleventh Amendment, it is nevertheless not within Congress' power to abrogate such immunity by 'deeming' a waiver."); *Grabscheid v. Michigan Employment Sec. Comm'n (In re C.J. Rogers, Inc.)*, 212 B.R. 265, 269-73 (E.D. Mich. 1997) (finding that 11 U.S.C. § 106(b), though couched in terms of a waiver, is really an impermissible abrogation of a state's sovereign immunity). *But see Arecibo Cmty. Health v. Puerto Rico*, 270 F.3d 17, 24-27 (1st Cir. 2001) (holding that section 106(b) is not a constructive waiver provision); *Straight v. Wyoming Dep't of Transp. (In re Straight)*, 143 F.3d 1387, 1392 (10th Cir. 1997) ("[Section] 106(b) does not pretend to abrogate a state's immunity, it merely codifies an existing equitable circumstance under which a state can choose to preserve its immunity by not participating in a bankruptcy proceeding or to partially waive that immunity by filing a claim.").

[31] Similarly, the Thirteenth, Fifteenth, Nineteenth, Twenty-Third, Twenty-Fourth, and Twenty-Sixth Amendments contain provisions that allow Congress to enforce these Amendments against the States. *See* U.S. Const. amends. XIII, § 2; XV, §2; XIX § 2; XXIII, § 2; XXIV, § 2; XXVI, § 2. Presumably, if the States were violating the rights guaranteed by one of these Amendments, Congress would be able to abrogate the States' sovereign immunity as a means of enforcing the Amendments.

Baltimore, 32 U.S. (7 Pet.) 243, 249 (1833), the Due Process Clause incorporated most of the provisions of the Bill of Rights.[32] *See* 2 David M. O'Brien, *Constitutional Law and Politics* 310-11 (5th ed. 2003) (chart listing cases and specific provisions of the Bill of Rights). *Cf.* Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* (1986) (arguing that the Privileges or Immunities Clause incorporates all provisions of the Bill of Rights). Second, Section 5 gives Congress the authority to enact legislation that enforces the substantive guarantees of the Fourteenth Amendment against the States. *See City of Boerne v. Flores*, 521 U.S. 507, 519-20 (1997). Consequently, if the States have engaged in conduct that violates the Fourteenth Amendment, then Congress can take remedial action to correct the violation and to prevent future violations. *Kimel*, 528 U.S. at 81. Because "the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment," *Fitzpatrick*, 427 U.S. at 456 (citation omitted), one way of enforcing the Fourteenth Amendment is to abrogate the States' sovereign immunity.[33] If Congress is enforcing the Fourteenth Amendment,

[32] Indeed, it appears that the only provisions of the Bill of Rights that have not been incorporated are: (1) the Second Amendment; (2) the Third Amendment; (3) that portion of the Fifth Amendment guaranteeing a right to indictment by a grand jury; (4) that portion of the Seventh Amendment guaranteeing a right to a jury trial in civil cases; and (5) that portion of the Eighth Amendment prohibiting excessive fines and bail. 2 O'Brien, *supra*, at 312.

[33] If Congress wishes to abrogate sovereign immunity as a means of enforcing the Fourteenth Amendment, then it must make "a clear legislative statement." *Blatchford*, 501 U.S., at 786. "To temper Congress' acknowledged powers of abrogation with due concern for the Eleventh Amendment's role as an essential component of our constitutional

(Continued on following page)

then it may abrogate the States' sovereign immunity. *See Tennessee v. Lane*, 541 U.S. 509, 518 (2004); *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721, 726 (2003); *Garrett*, 531 U.S. at 364; *Kimel*, 528 U.S. at 80; *Alden*, 527 U.S. at 756; *College Sav. Bank*, 527 U.S. at 670; *Florida Prepaid*, 527 U.S. at 637; *Seminole Tribe*, 517 U.S. at 59. In other words, abrogation of sovereign immunity is an appropriate response to unconstitutional conduct by the States.

In sum, the ability of Congress to abrogate sovereign immunity depends upon the nature of the power that Congress purports to use. If Congress is seeking merely to use its general Article I powers, then the principles of dual sovereignty, as confirmed by the both the Tenth and Eleventh Amendments, as well as the Constitution's structures, preclude abrogation. In contrast, if Congress is seeking to remedy unconstitutional conduct, then it may abrogate sovereign immunity. Because the power to pass bankruptcy laws is a general Article I power and not an effort to enforce the Fourteenth Amendment,[34] Congress

---

structure, we have applied a simple but stringent test: 'Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.'" *Dellmuth v. Muth*, 491 U.S. 223, 227-28 (1989).

[34] Katz has never suggested that Congress abrogated sovereign immunity as a means of enforcing the Fourteenth Amendment. Furthermore, the Circuits that have addressed the issue have universally held that 11 U.S.C. § 106(a) is not valid Fourteenth Amendment legislation. *See Crow*, 394 F.3d at 922-24; *Schlossberg*, 119 F.3d at 1146-47.

may not use the Article I Bankruptcy Clause to abrogate sovereign immunity.[35]

---

[35] Regardless of how this Court decides the abrogation issue with respect to Katz' preferential transfer claims, it is clear that Katz' contract claims are barred by sovereign immunity. This is so for two reasons.

First, the purported abrogation of sovereign immunity in 11 U.S.C. § 106(a) *does not apply* to causes of action – such as contract actions – belonging to the debtor that become property of the estate under 11 U.S.C. § 541. *See* 11 U.S.C. § 106(a)(1) (listing specific code sections for which sovereign immunity is abrogated and omitting § 541). *See also House Judiciary Committee, Bankruptcy Reform Act of 1994 – Section-By-Section Description*, Cong. Rec. H 10764, 10766 (103rd Cong., 2nd Sess., Oct. 4, 1994) (Section 106(a) "allows the assertion of bankruptcy causes of action, but specifically excludes causes of action belonging to the debtor that become property of the estate under section 541."). "Indeed, 11 U.S.C. § 106(a)(1) conspicuously omits § 541 from those particular sections of the Bankruptcy Code to which sovereign immunity is specifically abrogated." *William Ross, Inc. v. Biehn Const., Inc. (In re William Ross, Inc.)*, 199 B.R. 551, 554 (Bankr. W.D. Pa. 1996). Because Katz' contract claims against the Virginia Institutions only become property of the estate by way of 11 U.S.C. § 541, *see Id.* and because there is no purported abrogation of sovereign immunity for claims involving 11 U.S.C. § 541, sovereign immunity bars the contract claims. Katz cannot claim that sovereign immunity is abrogated for the contract claims.

Second, contrary to Katz' assertions in Count II of the various complaints, J.A. at 5-6 (Virginia Military Institute); J.A. at 14 (Central Virginia); J.A. at 22-23 (Blue Ridge); J.A. at 32 (New River), 11 U.S.C. § 542 – which is covered by the purported abrogation – *cannot be used to recover funds allegedly owed* on the contracts. Quite simply, 11 U.S.C. § 542 applies only to debts that have been reduced to judgment. *William Ross, Inc.*, 199 B.R. at 554. It does not apply to claims – such as Katz' contract actions – where there is a dispute as to both whether money is owed and, if so, the amount of money owed. *See Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.)*, 4 F.3d 1095, 1102 (2d Cir. 1993). Indeed, to say that 11 U.S.C. § 542 somehow applies to Katz' unresolved contract claims is to ignore the fundamental distinction between common law actions and actions created by the Bankruptcy Code. *See Northern Pipeline Const. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 82-84 (1982).

Because the purported abrogation of sovereign immunity does not apply to causes of action that become property of the estate under 11

(Continued on following page)

Since Congress' attempt to abrogate sovereign immunity is invalid, Katz' claims against the Virginia Institutions are barred by sovereign immunity.[36] Absent a valid abrogation

U.S.C. § 541 and because Katz may not use 11 U.S.C. § 542 to litigate a contract dispute, sovereign immunity bars Katz' contract claims. Therefore, to the extent that the lower court held that sovereign immunity did not bar Katz' contract claims, the court of appeals should be summarily reversed.

[36] Although the question presented is limited to whether Congress abrogated sovereign immunity, Katz nevertheless may attempt to argue that (1) Virginia Military Institute's filing of a proof of claim constitutes a waiver of sovereign immunity for *all* of the Virginia Institutions; or (2) *Hood II* expanded *in rem* jurisdiction so that it encompasses all adversary proceedings. Because these arguments were not addressed by the district court or the court of appeals and because this Court is not a court of "first view," this Court should decline to address them. *See Cutter v. Wilkinson*, 125 S. Ct. 2113, 2120 n.7 (2005). Rather, this Court should confine itself to the narrow issue contained in the question presented – whether Congress may use the Bankruptcy Clause to abrogate sovereign immunity?

However, if Katz makes such arguments and if this Court decides to address these arguments, then those arguments should be rejected.

First, the filing of a proof of claim by one state agency does not waive sovereign immunity for all state agencies. To explain, the term "waiver" is a mischaracterization of what occurs when a State files a proof of claim or initiates litigation. Sovereign immunity is immunity from being sued by another party. As such, it does not really come into play when the sovereign is the plaintiff. To the contrary, there is the use of a wholly separate power, the voluntary right of a State to invoke its right of access to a federal court to protect the State's legal interests. Karen Cordry, *Seminole Seven Years On* in *Annual Survey of Bankruptcy Law 2002-03* 383, 455 (William L. Norton ed. 2003). *See also* Dan Schweitzer, *LaPides v. Board of Regents of the University of Georgia System: A Partial Answer to the Sovereign Immunity-Waiver Conundrum*, 17 Nat'l Envir. L.J. 3 (Dec. 2002/Jan. 2003). When a State initiates litigation, the State does not "waive" sovereign immunity, but the State merely exposes itself to the equivalent of a compulsory counterclaim that does not exceed in amount or differ in kind from the relief sought by the State. Thus, when a State files a proof of claim in bankruptcy, the bankruptcy court may entertain the debtor's objections to that claim. *Gardner*, 329 U.S. at 574. However, the bankruptcy court

(Continued on following page)

of the State's sovereign immunity, sovereign immunity bars an adversary proceeding against a state agency to recover a preferential transfer. *Hoffman*, 492 U.S. at 102-04. *See also Nordic Village*, 503 U.S. at 38 (Absent a valid waiver, sovereign immunity bars bankruptcy adversary proceeding against the National Government that seeks to recover a post-petition transfer.). Katz' adversary proceedings are substantively indistinguishable from the proceedings at issue in *Hoffman* and *Nordic Village*.

may not order relief of a different type or order a monetary payment that exceeds the amount of the proof of claim. Therefore, after the proof of claim was filed, the bankruptcy court could hear any objections that Katz might have to that claim and could order relief against Virginia Military Institute up to the amount of $43,237.60. However, the bankruptcy court could not order relief beyond the $43,237.60. That portion of Katz' claim that is greater than $43,237.60 is barred by sovereign immunity.

Second, the basis for jurisdiction in this case is *in personam*, not *in rem*. An *in rem* action is fundamentally different from "an adversary proceeding by the bankruptcy trustee seeking to recover property in the hands of the State on the grounds that the transfer was a voidable preference." *Hood II*, 120 S. Ct. at 1914. Indeed, in *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992), this Court held that an adversary proceeding to recover a preferential transfer was not an *in rem* proceeding. *Id.* at 38 ("Respondent sought to recover a sum of money, not 'particular dollars,' so there was no *res* to which the court's *in rem* jurisdiction could have attached."). *See also Hoffman*, 492 U.S. at 102. ("[A] State that files no proof of claim would be bound, like other creditors, by discharge of debts in bankruptcy, . . . but would not be subjected to monetary recovery."). In other words, Katz seeks property unequivocally in the possession of the Virginia Institutions to which the Virginia Institutions undoubtedly have title. Any judgment the bankruptcy court might issue would determine a claim against only the Virginia Institutions, and not "against the world."

II. THE BANKRUPTCY CLAUSE'S UNIFORMITY REQUIREMENT DOES NOT ALTER THE ANALYSIS.

As observed above, unlike the other Article I powers, the Bankruptcy Clause requires that there be "uniform laws." *See* U.S. Const. art. I, § 8, cl. 4 ("To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.").[37] In the view of the court of appeals, the presence of this Uniformity Requirement signified that "the Bankruptcy Clause operates differently than Congress' other Article I powers," *Hood II*, 124 S. Ct. at 1920 (Thomas, J., joined by Scalia, J., dissenting). Specifically, the Sixth Circuit held, "because a federal bankruptcy system could cure the previous systems' ills only if it applied uniformly to all creditors and debtors, the Bankruptcy Clause must grant Congress the power to abrogate the states' sovereign immunity." *Hood I*, 319 F.3d at 767.

Yet, the court of appeals was incorrect. The Uniformity Requirement does not alter the basic analysis – Congress may not use any of the Article I Bankruptcy Clause to abrogate sovereign immunity. This is so for three reasons.

[37] Of course, this constitutional provision – Article I, Section 8, clause 4 – actually contains two parts. The first part is the Naturalization Clause ("To establish an uniform Rule of Naturalization . . .") and the second part is the Bankruptcy Clause. Yet, while both the Naturalization Clause and the Bankruptcy Clause use the term "uniform" and while the two Clauses are separated by a comma rather than semicolon, there does not appear to be any constitutional linkage between the two Clauses. Indeed, Madison described naturalization and bankruptcy as distinctly different issues. *See The Federalist No. 42*, at 237-39 (James Madison). He engaged in an extensive discussion of the Naturalization Clause, *Id.* at 237-39, but devoted only one sentence to the Bankruptcy Clause, *Id.* at 239. In any event, Madison never suggested that either Clause could be used to diminish the States' sovereign immunity.

First, the Uniformity Requirement does not require that all debtors and creditors be treated alike or that the states be treated like private parties. Second, the need for national uniformity does not trump the States' sovereign immunity. Third, "[t]he power the Bankruptcy Clause grants Congress, however, is internally limited by the uniformity requirement." 1 Laurence H. Tribe, *American Constitutional Law* 847 (3d ed. 2000). Thus, the Bankruptcy Clause power is actually narrower, not broader, than the other Article I powers, an interpretation confirmed by the historical record.

A. The Uniformity Requirement Does Not Require That The States Be Treated Like Private Parties.

"The uniformity requirement is not a straightjacket that forbids Congress to distinguish among classes of debtors, nor does it prohibit Congress from recognizing that state laws do not treat commercial transactions in a uniform manner."[38] *Railway Labor Executives Ass'n v. Gibbons*, 455 U.S. 457, 469 (1982). "The uniformity requirement of the Bankruptcy Clause is not an Equal

[38] Indeed, there are many contexts where the Bankruptcy Code explicitly treats the States and their local governments differently than other creditors. Taxes, for instance, receive priority under 11 U.S.C. § 507(a)(8), but tax liens can be subordinated to priority creditors in 11 U.S.C. § 724(b). Under 11 U.S.C. § 505, debtors have special rights to relitigate tax claims – even those claims on which the debtor has defaulted prior to the filing of the bankruptcy petition. Similarly, the automatic stay, 11 U.S.C. § 362(a), has an exception for police and regulatory activities. *See* 11 U.S.C. § 362(b)(4). However, the States and their local governments are subject to special anti-discrimination provisions in 11 U.S.C. § 525 to which there is no police and regulatory exception. *Federal Communications Comm'n v. Nextwave Pers. Communications, Inc.*, 537 U.S. 293, 302 (2003).

Protection Clause for bankrupts." *Id.* at 471 n.11. Thus, Congress may "define classes of debtors" and "structure relief accordingly."[39] *Id.* at 473. Indeed, Congress may enact bankruptcy laws that are limited to one industry in one region. *See Blanchette v. Connecticut General Ins. Corporations*, 419 U.S. 102, 158-59 (1974). Moreover, "uniformity does not require the elimination of any differences among the States in their laws governing commercial transactions." *Railway Labor,* 455 U.S. at 469. A federal bankruptcy statute "may recognize the laws of the State in certain particulars, although such recognition may lead to different results in different States."[40] *Stellwagen v. Clum*, 245 U.S. 605, 613 (1918). *See also Hanover National Bank v. Moyses*, 186 U.S. 190, 189-90 (1902) (Congress can give effect to the allowance of exemptions prescribed by state law without violating the uniformity

[39] For example, certain entities, such as insurance companies and most banks, are not permitted to file for bankruptcy protection. 11 U.S.C. § 109(b)(2). Moreover, there are special chapters for family farmers, 11 U.S.C. §§ 1201 through 1231, and municipalities, 11 U.S.C. §§ 901 through 946. Furthermore, railroads are not permitted to file under Chapter 7, but may file under Chapter 11. *See* 11 U.S.C. § 109(b)(1) and (d).

[40] The "basic federal rule" in bankruptcy is that state law governs the substance of claims and the burden of proof required. *Raleigh v. Illinois Dep't of Revenue*, 530 U.S. 15, 20 (2000). For example, the current Bankruptcy Code uses state law to determine what property rights are considered to be "property of the estate." *Butner v. United States*, 440 U.S. 48, 54 (1979). Similarly, the determination of property rights in the property of the estate is made under state law. *Raleigh*, 530 U.S. at 15. Moreover, the Bankruptcy Code does not create a federal right of setoff, but, instead, generally preserves existing setoff rights created under state law, in 11 U.S.C. § 553(a). *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16, 18 (1995).

requirement.).[41] Rather, "[t]he constitutional requirement of uniformity is a requirement of geographic uniformity." *Vanston Bondholders Protective Comm. v. Green,* 329 U.S. 156, 172 (1946) (Frankfurter, J., joined by Jackson & Burton, JJ., concurring).[42] In other words, as long as the bankruptcy laws mandate that similar transactions involving similar debtors be treated the same way by the bankruptcy courts *within a particular State*, the Uniformity Requirement is satisfied.[43] There is no mandate that the States be treated the same as private parties.[44]

[41] Under 11 U.S.C. § 522(b), a State may require – to the total exclusion of federal law – that its state laws determine what comes out of the estate as exemptions. Of course, state laws regarding exemptions can vary widely and result in great disparity. For example, under Virginia law, the homestead exemption may not exceed $5,000.00 for an individual, or plus up to an additional $500.00 in value for each dependent. *Virginia Code* § 34-4. In contrast, under Florida law, the homestead exemption is unlimited in amount. *Florida Const.* art. X, § 4.

[42] As Justice Frankfurter, joined by Justices Jackson & Burton, explained:

> To establish uniform laws of bankruptcy does not mean wiping out the differences among the forty-eight States in their laws governing commercial transactions. The Constitution did not intend that transactions that have different legal consequences because they took place in different States shall come out with the same result because they passed through a bankruptcy court. In the absence of bankruptcy such differences are the familiar results of a federal system having forty-eight diverse codes of local law. These differences inherent in our federal scheme the day before a bankruptcy are not wiped out or transmuted the day after.

Vanston, 329 U.S. at 172-73. (Frankfurter, J., joined by Jackson & Burton, JJ., concurring).

[43] Recognizing that the States are immune from adversary proceedings in bankruptcy would not make the system non-uniform in a way that would have concerned the Framers. "If it had the effect, for instance, of making all state debts non-dischargeable, this would only return the system to what occurred under the British law that was the

(Continued on following page)

B. The Need for National Uniformity Does Not Trump The States' Sovereign Immunity.

The need for national uniformity does not trump the States' sovereign immunity.[45] To explain, when Congress

template for American bankruptcy law when the Constitution was passed." Cordry, *supra*, at 443.

[44] Furthermore, there are sound policy reasons for treating the States differently from private parties. As Professor Feibelman has observed:

> In the first place, state governments are important regulatory agents. Whether by historical accident or purposeful design, the American states share responsibility with the national government for creating and administering public law. In contemporary society, this function demands considerable expertise, coherence, and consistency. As a general rule, bankruptcy law and bankruptcy courts should not interfere with the regulatory activities of governmental entities – federal, state, or local. In the case of federal regulators, however, the interference of bankruptcy law may be more justifiable because Congress is able to ensure that federal bankruptcy law and federal regulators are not working at cross-purposes. There is no similar institutional bridge between state governments and bankruptcy courts. The possibility that bankruptcy courts might interfere with important regulatory activity is thus significantly greater with respect to state governments.

Adam Feibelman, *Federal Bankruptcy Law and State Sovereign Immunity*, 81 Tex. L. Rev. 1381, 1385 (2003).

[45] Moreover, the fact that the States benefit from the Nation's bankruptcy laws does not mean that Congress has greater power to abrogate immunity. The States, particularly state universities, develop and own intellectual property. Yet, despite this direct benefit to the States, Congress may not use the Intellectual Property Clause to abrogate sovereign immunity. *See College Sav. Bank*, 527 U.S. at 669-670; *Florida Prepaid*, 527 U.S. at 636.

Similarly, the States frequently act as participants in interstate commerce. Indeed, when Congress regulates interstate commerce, those regulations are applicable to the States. *See Condon*, 528 U.S. at 148-49. Yet, despite this benefit to the States and despite Congress' clear

(Continued on following page)

exercises its powers under the Intellectual Property Clause, U.S. Const. art. I, § 8, cl. 8, there is a need for national uniformity. *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 156 (1989) ("[T]he States may not offer patent-like protection to intellectual creations which would otherwise remain unprotected as a matter of federal law."). Yet, despite this need for uniformity, the States' sovereign immunity bars intellectual property claims. *Florida Prepaid*, 527 U.S. at 645 ("The need for uniformity in the construction of patent law is undoubtedly important, but that is a factor which belongs to the Article I patent-power calculus, rather than to any determination of whether a state plea of sovereign immunity deprives a patentee of property without due process of law.").

Similarly, while there might be a "constitutional necessity of uniformity in the regulation of maritime commerce" under the Foreign Commerce Clause, U.S. Const. art. I, § 8, cl. 3, the States' sovereign immunity is not diminished. *Federal Maritime Comm'n*, 535 U.S. at 767. Moreover, although "the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause," *Seminole Tribe,* 517 U.S. at 62, the Indian Commerce Clause cannot be used to abrogate sovereign immunity. *Id.* at 47. Furthermore, even though "[i]t would be difficult to overstate the breadth and depth of the [interstate] commerce power," *Union Gas*, 491 U.S. at 20 (Brennan, J., joined by Marshall, Blackmun, & Stevens, JJ., announcing the judgment of the Court), the States are immune from suits based on statutes

authority to subject the States to general Interstate Commerce Clause regulation, Congress may not use the Interstate Commerce Clause to abrogate sovereign immunity. *See Garrett,* 531 U.S. at 364; *Kimel*, 528 U.S. at 78-80.

passed pursuant to the Interstate Commerce Clause. *See Garrett,* 531 U.S. at 364; *Kimel*, 528 U.S. at 78-80. If the need for national uniformity in intellectual property, foreign commerce, Indian commerce, and interstate commerce does not trump the States' sovereign immunity, then surely the Bankruptcy Clause's Uniformity Requirement does not do so. *See Seminole Tribe*, 517 U.S. at 72 ("[T]he background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area . . . that is under the exclusive control of the Federal Government.").

C. The Uniformity Requirement Limits the Power of Congress.

The Uniformity Requirement does not expand the power of the Congress so that the Bankruptcy Clause may be used to abrogate sovereign immunity. To the contrary, the Uniformity Requirement actually is an "affirmative limitation or restriction upon Congress' power." *Railway Labor*, 455 U.S. at 468. As a result, Congress' power under the Bankruptcy Clause is significantly less than Congress' power under the other Article I Clauses, not greater.

To explain, when Congress exercises its Interstate Commerce Clause authority, there is no requirement of uniformity. *See Hodel v. Indiana*, 452 U.S. 314, 332 (1981); *Secretary of Agric. v. Central Roig Refining Co.*, 338 U.S. 604, 616 (1950). *See also Railway Labor*, 455 U.S. at 468 (Uniformity Requirement mandates "uniformity in the applicability of legislation," which is not required by the Commerce Clause). Thus, "Congress may devise . . . a national policy with due regard for the varying and fluctuating interests of different regions." *Central Roig*, 338 U.S. at 616. *See also Hodel,* 452 U.S. at 332 ("A claim of

arbitrariness cannot rest solely on a statute's lack of uniform geographic impact.").

In sharp contrast, as explained above, when Congress exercises its Bankruptcy Clause authority, it must achieve uniformity. *Railway Labor,* 455 U.S. at 468-70. Consequently, Congress is prohibited "from enacting a bankruptcy law that, by definition, applies only to one regional debtor. To survive scrutiny under the Bankruptcy Clause, a law must at least apply uniformly to a defined class of debtors." *Id.* at 473. Because there is a requirement of uniformity for bankruptcy laws, Congress' power under the Bankruptcy Clause is less than its power under the Commerce Clause.

Similarly, if Congress has *not* exercised its Interstate Commerce Clause powers, the States *may not* regulate interstate commerce. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 571 (1997); *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979). A "negative command, known as the dormant Commerce Clause" bars the States from regulating interstate commerce even in those situations where Congress has not acted, because it is assumed that, in such cases, Congress has chosen not to regulate and that choice must be respected by the States. *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995).

In sharp contrast, if Congress has not exercised its Bankruptcy Clause powers, the States *may* enact bankruptcy laws so long as such regulation does not violate the Contract Clause, U.S. Const. art. I, § 10, cl. 1. *See Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 196-97 (1819). *See also* David P. Curie, *The Constitution in the Supreme Court: The First Hundred Years, 1789-1888* 149-50 (1985) (contrasting Chief Justice Marshall's pronouncements

regarding the Bankruptcy Clause with his pronouncements regarding the Interstate Commerce Clause). In other words, the mere existence of the bankruptcy power, if unexercised by Congress, does not preempt state action on the subject. *Brown v. Smart*, 145 U.S. 454, 457 (1892). Indeed, in the absence of federal laws, States could even discharge debts, so long as the discharge was properly limited in time and scope. *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827). Because there is no "Dormant Bankruptcy Clause," Congress' power under the Bankruptcy Clause is less than its power under the Interstate Commerce Clause. Thus, there is no basis for exempting the Bankruptcy Clause from the rationale of *Seminole Tribe* and *Hans*.

Moreover, the historical record confirms that the scope of Bankruptcy Clause power is narrow. The Bankruptcy Clause effectively was ignored in both the Constitutional Convention and the subsequent struggle for ratification. During the Constitutional Convention, the Delegates ignored the subject of a national bankruptcy power until virtually the end of the Convention and then adopted it with only token opposition.[46] Cordry, *supra*, at 400.[47] *See also*

[46] On August 29, 1787 – less than three weeks before the September 17 signing – Charles Pinckney of South Carolina moved to include a reference to the power of Congress to establish "uniform laws of bankruptcy." Three days later, on September 1, John Rutledge of South Carolina suggested that the reference should be placed after the existing reference to the power to establish uniform rules of naturalization and this recommendation was accepted on September 3. Cordry, *supra*, at 400.

[47] In his classic account of the Constitutional Convention, Professor Farrand mentions the bankruptcy power only once. Max Farrand, *The Framing of the Constitution of the United States* 141 (1913).

Railway Labor, 455 U.S. at 471 (discussing constitutional debates on the Bankruptcy Clause). Similarly, in the eighty-five essays that compromise *The Federalist*, a *single sentence* is devoted to the Bankruptcy Clause. *See The Federalist No. 42*, at 239 (James Madison) ("The power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce and will prevent so many frauds where the parties or their property may lie or be removed into different States that the expediency of it seems not likely to be drawn into question."). As the lower court correctly noted, the Bankruptcy Clause power was not mentioned in the States' Ratification Debates. *See Hood I*, 319 F.3d at 766-68. If the Bankruptcy Clause power were broader than the other Article I powers, then surely it would have generated more comment and debate in both the Constitutional Convention and in the writings urging ratification.

Furthermore, after the adoption of the Constitution, Congress almost completely ignored the Bankruptcy Clause power. *See* Joseph Story, *A Familiar Exposition of the Constitution of the United States* § 175 (Regnery Gateway 1986) (1840) ("The power to pass bankrupt laws is equally important and proper to be intrusted to Congress, although it is greatly to be regretted, that it has not, except for very brief periods been acted upon by Congress."). The first federal bankruptcy laws were not passed until 1800 and then repealed two and a half years later. *See* Lawrence Friedman, *A History of American Law* 238 (1973).[48] Congress then waited until 1841 to pass a

[48] When Congress did pass a bankruptcy act, the law was limited to merchants and did not extend to farmers or other occupations. See Friedman, *supra*, at 238-39. *See also* William Rawale, *A View of the Constitution of the United States* (2nd ed. 1829) in 2 Phillip B. Kurland &

(Continued on following page)

second bankruptcy act and then repealed it after a mere two years. *Id.* Congress tried yet again in 1867 and this attempt lasted a full eleven years. *Id.* at 480-81. It was not until 1898 – 110 years after the Constitution's adoption – that Congress managed to pass a bankruptcy act that remained in effect for an extended period. *Id.* at 482. If the Bankruptcy Clause power were somehow greater than the other Article I powers, one would expect Congress to exercise that power on a regular basis, not to effectively ignore it.[49]

Ralph Lerner (eds.), *The Founders' Constitution* 639 (Liberty Fund 2005) ("Bankrupt laws are generally, perhaps properly, considered as confined to the mercantile class, who are more exposed to pecuniary vicissitudes than those who pursue some other occupations.").

[49] Moreover, when Congress does exercise its Bankruptcy Clause powers, there are compelling reasons to treat the States differently from private parties. As Professor Feibelman explained:

> When states take actions to recover financial obligations from private citizens, they may seem to act more like private creditors than when they engage in regulatory activities. However, it is impossible to fully separate states' financial and regulatory interests. The reason that states raise money in the first place is to fund their governmental activities and to provide public goods. They also often use financial tools to affect the behavior of private actors. Furthermore, states face constraints that private creditors do not face in making up for revenue lost to private insolvencies. Competitive markets insure that private creditors can and do easily adjust their rates to reflect their added costs from insolvency losses. To make a similar adjustment by raising additional revenues, states must overcome more daunting political obstacles.

Feibelman, *supra*, at 1385.

III. HAMILTON'S WRITINGS DO NOT ALTER THE ANALYSIS.

The lower court, like the four-Justice dissent in *Atascadero* and the four-Justice plurality in *Union Gas*, placed great emphasis on Hamilton's writings in *The Federalist No. 32* and *The Federalist No. 81*. Reading those two essays together and disregarding any of the other essays, the court of appeals in *Hood I* concluded that – at least in Hamilton's view – when the States had surrendered their sovereign authority to make bankruptcy laws, they also had surrendered their sovereign immunity from bankruptcy proceedings. Because Congress had the power to legislate, it necessarily had the power to abrogate.

Yet, the Sixth Circuit rationale was incorrect. Hamilton's writings do not alter the analysis – the Bankruptcy Clause may not be used to abrogate sovereign immunity. This is so for three reasons. First, the lower court misinterpreted Hamilton. Second, regardless of what Hamilton thought, his views are not dispositive. Third, acceptance of the court of appeals' reasoning would transform this Court's dual sovereignty jurisprudence.

A. The Lower Court Misinterpreted Hamilton.

The lower court, focusing only on *The Federalist Nos. 32* and *81* assumed, at least implicitly, that Hamilton believed the sovereign power to legislate could not be separated from the sovereign immunity from suit. Because sovereign power was inseparable from sovereign immunity, the surrender of sovereign power to legislate necessarily included the surrender of sovereign immunity. Thus, when the States ratified the Constitution and surrendered their sovereign power to make bankruptcy laws, they necessarily also surrendered their sovereign immunity from suits arising out of bankruptcy.

Hood I, 319 F.3d at 767. Of course, if the surrender of sovereign power always includes surrender of sovereign immunity, it logically follows that, by surrendering the Article I powers to the National Government, the States surrendered their immunity for suits arising out of the National Government's exercise of the Article I powers. *See Union Gas*, 491 U.S. at 19-20 (Brennan, J., joined by Marshall, Blackmun, & Stevens, JJ., announcing the judgment of the Court); *Atascadero*, 473 U.S. at 277-78 (Brennan, J., joined by Marshall, Blackmun, & Stevens, JJ., dissenting). Thus, there is no sovereign immunity with respect to *any* of the Article I powers. *See Union Gas* 491 U.S. at 42 (Scalia, J., joined by Rehnquist, C.J., O'Connor, & Kennedy, JJ., dissenting,) ("[I]f the Article I commerce power enables abrogation of state sovereign immunity, so do all the other Article I powers."). In effect, if Congress has the power to legislate substantively, then it has the power to abrogate immunity.

However, the Sixth Circuit, by focusing exclusively on two essays, misinterpreted Hamilton's views. Hamilton believed that the sovereign power to legislate could be separated from sovereign immunity from suit. For example, in *The Federalist No. 82*, Hamilton states that his comments in *The Federalist No. 32* concerned only the sovereign power to legislate and that the rules might be different with respect to judicial authority – sovereign immunity. *The Federalist No. 82* at 460 (Alexander Hamilton) ("Though these principles may not apply with the same force to the judiciary as to the legislative power . . ."). Moreover, while Hamilton supported a strong National Government, his writings also reflect a belief that the States would protect the People from abuses by the National Government. *See generally* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1492-1520 (1987). *See also The Federalist No. 28*, at 149 (Alexander Hamilton) ("Power being almost always the

rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government."). The idea that the States would check the power of the National Government is fully consistent with the idea that both the States and the National Government are sovereign. If both the States and the National Government are sovereign, then the separation of sovereign power from sovereign immunity is not only possible, but also necessary.

If, as *The Federalist No. 82* and his other writings indicate, Hamilton believed that sovereign power could be separated from sovereign immunity, then the analysis changes completely. Surrender of sovereign power does not necessarily entail surrender of sovereign immunity. The States could surrender their sovereign authority over foreign, Indian, and interstate commerce, but retain sovereign immunity in those areas. *See Federal Maritime Comm'n*, 535 U.S. at 767; *Kimel*, 528 U.S. at 78; *Seminole Tribe*, 517 U.S. at 72. Similarly, the States could surrender their sovereign power over intellectual property, but still be immune. *See College Sav. Bank*, 527 U.S. at 669-70; *Florida Prepaid*, 527 U.S. at 636. Conversely, the National Government could be prohibited from exercising sovereign powers in contexts not mentioned in Article I, *see* U.S. Const. amend. X, but retain sovereign immunity in all of those contexts. *See Department of the Army v. Blue Fox*, 525 U.S. 255, 260 (1999). Thus, when the States surrendered their sovereign power to make bankruptcy laws, the States did not necessarily surrender their sovereign immunity from suits related to bankruptcy. If Hamilton believed in the division of sovereignty, then it is this interpretation – that the States surrendered power, but not immunity – that is correct.

B. Hamilton's Views Are Not Dispositive.

Even if the Sixth Circuit's interpretation – that Hamilton believed the surrender of sovereign authority to legislate necessarily required the surrender of sovereign immunity – is correct, Hamilton's views are not dispositive of the issue.[50]

The historical reality is that *some* of the Framers believed that the States, by ratifying the Constitution, had surrendered their sovereign immunity. *See* 1 Phillip Kurland & Ralph Lerner (eds.), *The Founders Constitution* 242-46 (Liberty Fund 2005) (explaining the contrasting views of the Framers on the issue of the nature of federalism). *See also Id.* at 246-97 (various letters, essays, and publications from the framing generation setting forth differing views on federalism). Indeed, the four Justices in the *Chisholm* anti-immunity majority – Chief Justice Jay, Justice Cushing, Justice Wilson, and Justice Blair – played significant roles in the Constitutional Convention, the subsequent State Ratification Conventions, or in the authorship of *The Federalist*. *See* Kermit L. Hall (ed.), *Oxford Companion to the Supreme Court of the United States* 90, 244-45, 515-16, 1091-92 (2nd ed. 2005) (biographies of Justice Blair, Justice Cushing, Chief Justice Jay, and Justice Wilson).[51] Yet, as the rapid adoption of the

[50] Moreover, *The Federalist* itself, while certainly informative and influential, is not dispositive. It is appropriate to consult not only *The Federalist*, but also the "writings of other intelligent and informed people of the time" that "display how the text of the Constitution was originally understood." Antonin Scalia, *A Matter of Interpretation: Federal Courts & The Law* 38 (1997).

[51] The lone *Chisholm* dissenter – Justice Iredell – played a significant role in both the Constitutional Convention and North Carolina's Ratification Convention. Hall, *supra*, at 509 (biography of Justice Iredell).

Eleventh Amendment in reaction to *Chisholm* demonstrates, the overwhelming national consensus was that the States had *not* surrendered their sovereign immunity when they surrendered sovereign authority to the National Government. *See* David E. Kyvig, *Explicit & Authentic Acts: Amending the U.S. Constitution, 1776-1995* 113-14 (1996) (noting that the Eleventh Amendment overwhelmingly passed Congress and was ratified by the States within a year). It is this overwhelming national consensus in favor of the States' sovereign immunity, not the individual views of a distinct minority of Framers, which should control.

C. Acceptance of the Lower Court's Interpretation Would Transform This Court's Dual Sovereignty Jurisprudence.

"The 'dual sovereignty' of our national and state governments is a novel experiment. But like many ingenious and complex innovations, it is a fragile one." Sandra Day O'Connor, *The Majesty of the Law* 56 (Paperback ed. 2004). Thus, in deciding a case involving the principles of dual sovereignty, this Court must be particularly vigilant regarding the ramifications of any decision.

This case illustrates the point. The court of appeals held that because Congress has the authority to enact substantive bankruptcy law, it necessarily also has the authority to abrogate sovereign immunity. This rationale is virtually identical to that articulated by the four-Justice plurality in *Union Gas* and the four-Justice dissent in *Atascadero*. *See Union Gas*, 491 U.S. at 19-20 (Brennan, J., joined by Marshall, Blackmun, & Stevens, JJ., announcing the judgment of the Court); *Atascadero*, 473 U.S. at 277-78 (Brennan, J., joined by Marshall, Blackmun, &

Stevens, JJ., dissenting). If this rationale applies to the Bankruptcy Clause, then it also applies to the Commerce Clause, the Intellectual Property Clause, and all other Article I Clauses. *Hoffman,* 492 U.S. at 111 (Marshall, J., joined Brennan, Blackmun, & Stevens, JJ., dissenting) ("I see no reason to treat Congress' power under the Bankruptcy Clause any differently [than the Commerce Clause], for both constitutional provisions give Congress plenary power over national economic activity."). In other words, if Congress can legislate, it can abrogate.

If this rule – that the power to legislate includes the power to abrogate – is the constitutional reality, then this Court's decisions in *Federal Maritime Commission, Garrett, Kimel, Alden, Florida Prepaid, College Savings Bank,* and, ultimately, *Seminole Tribe* logically have to be overruled. Under this rule, Congress' authority to regulate the terms and conditions of employment, *Garrett*; *Kimel*; *Alden*; to create an intellectual property system, *Florida Prepaid*; *College Savings Bank*; to regulate maritime commerce, *Federal Maritime Commission*; or to regulate commerce with Indian Tribes, *Seminole Tribe*; necessarily must include the authority to abrogate. Moreover, under the view that links the general power to legislate with extraordinary power to abrogate, sovereign immunity would never bar a federal claim that was not otherwise invalid as a matter of substantive constitutional law. While the States arguably would retain their immunity until Congress actually legislated, *see* Cordry, *supra* at 410 n.113, this rule effectively would overrule *Hans.* Thus, sovereign immunity would never bar a federal claim. Given that this Court has repeatedly reaffirmed the validity of *Hans* over the past 115 years, *see Seminole Tribe,* 517 U.S. at 54 n.7 (listing cases affirming the

validity of *Hans*), it would be extraordinary for this Court to suddenly abandon the proposition.

Moreover, if this Court were to adopt a constitutional rule that effectively abolished the States' sovereign immunity from federal claims, then serious doubt would be cast on the principles of dual sovereignty in other contexts. If Congress may destroy the States' sovereign immunity simply by legislating, then one must question whether the States retain sovereignty at all. *See* John T. Noonan, Jr., *Narrowing the Nation's Power: The Supreme Court Sides with the States* 41-85 (2002) (arguing that the States are not sovereign and do not have sovereign immunity); Gary Wills, *A Necessary Evil: A History of American Distrust of Government* 57-70 (1999) (suggesting that the individual States were never sovereign). If the States are not sovereign, then Congress – in the exercise of its normal legislative powers – could force state officials to enforce federal law, force state legislatures to enact specific legislation, or even dictate the location of the State Capitol. Thus, *Printz, New York,* and *Coyle* would be overruled. Similarly, if the States are not sovereign, then it is difficult to imagine why Congress may not pass the Violence Against Women Act (*Morrison*), the Gun-Free School Zones Act (*Lopez*), and the Religious Freedom Restoration Act (*Boerne*).

In sum, if the thread of sovereign immunity in the bankruptcy context is removed, then the tapestry of dual sovereignty quickly and almost inevitably unravels. "An interpretation of the original Constitution which permits Congress to eliminate sovereign immunity only if it wants to renders the doctrine a practical nullity and is therefore unreasonable." *Union Gas,* 491 U.S. at 42 (Scalia, J., joined by Rehnquist, C.J., O'Connor, & Kennedy, JJ., dissenting). Thus, this Court should reject the reasoning of

the lower court and reaffirm the principles of *Hans* and *Seminole Tribe*.

CONCLUSION

For the reasons stated above, the judgment of the United States Court of Appeals for the Sixth Circuit – that Congress may use the Article I Bankruptcy Clause to abrogate the States' sovereign immunity – should be **REVERSED.**

Respectfully submitted,

JUDITH WILLIAMS JAGDMANN
Attorney General of Virginia

WILLIAM E. THRO
State Solicitor General
Counsel of Record

CARLA R. COLLINS
MATTHEW M. COBB
ERIC A. GREGORY
JOEL C. HOPPE
COURTNEY M. MALVEAUX
VALERIE L. MYERS
A. CAMERON O'BRION
RONALD N. REGNERY
D. MATHIAS ROUSSY, JR.
WILLIAM R. SIEVERS
Associate State Solicitors General

BERNARD L. MCNAMEE II
Chief Deputy Attorney General

MAUREEN RILEY MATSEN
Deputy Attorney General

OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
Telephone: (804) 786-2436
Facsimile: (804) 786-1991

Counsel for the Petitioners

June 17, 2005

(14)

No. 04-885

Supreme Court, U.S.
FILED
JUN 17 2005
OFFICE OF THE CLERK

In The Supreme Court of the United States

CENTRAL VIRGINIA COMMUNITY COLLEGE,
VIRGINIA MILITARY INSTITUTE,
NEW RIVER COMMUNITY COLLEGE, and
BLUE RIDGE COMMUNITY COLLEGE,

Petitioners,

v.

BERNARD KATZ, Liquidating Supervisor for
Wallace's Bookstores, Inc.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

JOINT APPENDIX

JUDITH WILLIAMS JAGDMANN
Attorney General of Virginia

WILLIAM E. THRO
State Solicitor General
Counsel of Record

OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
(804) 786-2436
(804) 786-1991 (facsimile)

Counsel for Petitioners

KIM MARTIN LEWIS
Counsel of Record

DINSMORE & SHOHL LLP
255 East Fifth Street,
Suite 1900
Cincinnati, Ohio 45202
(513) 977-8200
(513) 977-8141 (facsimile)

Counsel for Respondent

Petition For Certiorari Filed December 28, 2004
Certiorari Granted April 4, 2005

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

Relevant Docket Entries 1

Adversary Complaint filed February 5, 2003 against Virginia Military Institute 2

Adversary Complaint filed February 11, 2003 against Central Virginia Community College 11

Adversary Complaint filed February 14, 2003 against Blue Ridge Community College 18

Amended Complaint filed February 25, 2003 against New River Community College 28

May 19, 2003 Order denying sovereign immunity to Virginia Military Institute 36

May 19, 2003 Order denying sovereign immunity to Central Virginia Community College 38

May 19, 2003 Order denying sovereign immunity to Blue Ridge Community College 40

May 19, 2003 Order denying sovereign immunity to New River Community College 42

August 5, 2003 Order of the United States District Court for the Eastern District of Kentucky denying sovereign immunity and affirming the orders of the United States Bankruptcy Court for the Eastern District of Kentucky 44

August 4, 2004 Opinion of the United States Court of Appeals for the Sixth Circuit denying sovereign immunity 46

September 30, 2004 Order of the United States Court of Appeals for the Sixth Circuit denying rehearing *en banc* 48

RELEVANT DOCKET ENTRIES

In the United States Bankruptcy Court for the Eastern District of Kentucky:	
February 5, 2003	**Adversary Complaint filed against Virginia Military Institute**
February 11, 2003	**Adversary Complaint filed against Central Virginia Community College**
February 14, 2003	**Adversary Complaint filed against Blue Ridge Community College**
February 25, 2003	**Amended Complaint filed against New River Community College**
May 19, 2003	**Order denying sovereign immunity to Virginia Military Institute**
May 19, 2003	**Order denying sovereign immunity to Central Virginia Community College**
May 19, 2003	**Order denying sovereign immunity to Blue Ridge Community College**
May 19, 2003	**Order denying sovereign immunity to New River Community College**
United States District Court for the Eastern District of Kentucky	
August 5, 2003	**Decision affirming the orders of the United States Bankruptcy Court for the Eastern District of Kentucky**
In the United States Court of Appeals for the Sixth Circuit	
August 4, 2004	**Opinion affirming the judgment of the United States District Court for the Eastern District of Kentucky**
September 30, 2004	**Order denying rehearing *en banc***

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF KENTUCKY LEXINGTON DIVISION

In Re:	Chapter 11
WALLACE'S BOOKSTORES, INC., *et al.*,	Substantively Consolidated No. 01-50545
Debtors.	(Chief Judge William S. Howard)
BERNARD KATZ, LIQUIDATING SUPERVISOR FOR WALLACE'S BOOKSTORES, INC., *et al*	Adversary Proceeding No. 03-___
Plaintiff,	
v.	
VIRGINIA MILITARY INSTITUTE,	
Defendant.	

SERVE: General Robert L. Green, Superintendent, Virginia Military Institute, 303 Smith Hall, Lexington, VA 24450

Sam Whitt, President of Board of Visitors, Virginia Military Institute, 201 Smith Hall, Lexington, VA 24450

COMPLAINT TO AVOID AND RECOVER PREFERENTIAL TRANSFERS AND TO DISALLOW CLAIMS PURSUANT TO 11 U.S.C. §502

Plaintiff, Bernard Katz, Liquidating Supervisor for Wallace's Bookstores, Inc., by counsel, for his Complaint to Avoid and Recover Preferential Transfers against

Defendant, Virginia Military Institute, respectfully states as follows:

JURISDICTION AND VENUE

1. The United States Bankruptcy Court for the Eastern District of Kentucky has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157 and 1334, and Federal Rule of Bankruptcy Procedure Rule 7001(1).

2. Venue is proper in this district under 28 U.S.C. § 1409.

3. The relief requested herein is a core proceeding pursuant to 28 U.S.C. § 157(b)(1) and (b)(2)(A), (E), and (O).

4. The statutory predicates for the relief requested herein are Sections 541, 544(b), 547(b), and 550 of the Bankruptcy Reform Act of 1978, 28 U.S.C. §§ 101-1330 (the "Bankruptcy Code"), and Kentucky Revised Statute 378.060.

5. Plaintiff is the duly appointed and approved Liquidating Supervisor in this matter.

6. Defendant is engaged in the business of retail sales of supplies and/or other services in the United States. Upon information and belief, Defendant is a resident of the United States.

FACTUAL BACKGROUND

7. On February 28, 2001 (the "Original Petition Date"), Wallace's Book Stores, Inc., filed for protection

under Chapter 11 of Title 11 of the Bankruptcy Code. The bankruptcy case is being jointly administered by prior order of this Court as substantively consolidated Case No. 01-50545.

8. On March 20, 2002, the United States Bankruptcy Court for the Eastern District of Kentucky entered an "Order Confirming Second Amended Joint Consolidated Plan of Liquidation of Wallace's Bookstores, Inc. and Its Subsidiaries, and Wallace's Book Company, Inc., Debtors and Debtors-in-Possession," which Order approved the referenced Plan of Liquidation. The Plan of Liquidation provided for the appointment of a Liquidating Supervisor, who among other things, became the responsible party for the Debtors and became vested with the duties set forth in the Plan, including the duty to prosecute causes of action. Bernard Katz was appointed as Liquidating Supervisor and is thus the real party in interest as Plaintiff in this action.

9. Prior to the Original Petition Date and for some time thereafter, Debtors offered textbook buy-back and wholesale textbook distribution services and were collectively one of the nation's largest suppliers of new and used textbooks and college bookstore supplies throughout North America.

COUNT I
PAYMENT ON ACCOUNT

10. Paragraphs 1 through 9 above are incorporated herein by reference as if fully set forth herein.

11. Debtors fulfilled the Defendant's orders for goods by shipping the Sale Goods as requested by the Defendant.

12. The Defendant currently owes Debtors $30,409.00 for the Sale Goods.

13. Debtors have made demands, both orally and in writing, for payment in the amount of $30,409.00 for the Sale Goods.

14. Despite Debtors' efforts to collect the amount owed by the Defendant, that amount is now overdue, and the Defendant has refused to pay it.

15. Accordingly, Plaintiff [sic] are entitled to Judgment against the Defendant for $30,409.00, plus interest, attorneys' fees and costs incurred in collecting the amounts due from the Defendant.

COUNT II
TURNOVER OF PROPERTY OF THE ESTATE

16. Paragraphs 1 through 15 above, are incorporated herein by reference as if fully set forth herein.

17. Pursuant to 11 U.S.C. § 542, "an entity, other than a custodian, in possession, custody or control" of property of a debtor's estate must turn over and deliver such property or the value of such property to the debtor.

18. The amount owed to Debtors by the Defendant is property of Debtors' bankruptcy estate.

19. The Defendant is in possession of such property of Debtors' estate.

20. Such property is not of inconsequential value or benefit to Debtors' estate and to Debtors' creditors.

21. Accordingly, pursuant to Section 542(a) of the Bankruptcy Code, Plaintiff is entitled to an Order of the

Court directing the Defendant to immediately turn over the sum of $30,409.00, plus interest, attorneys' fees and costs incurred.

//

COUNT III
AVOIDANCE AND RECOVERY OF PREFERENTIAL TRANSFERS UNDER AUTHORITY OF 11 U.S.C. § 547 AND 11 U.S.C. § 550

22. Paragraphs 1 through 21 above are incorporated herein by reference as if fully set forth herein.

23. Debtors filed for protection under chapter 11 of the Bankruptcy Code on February 28, 2001, the Original Petition Date.

24. During the ninety (90) day period immediately preceding the Original Petition Date (the "Code Preference Period"), Defendant received certain transfers of interest of Debtors in property totaling $25,595.00, which were avoidable preferential transfers under 11 U.S.C. § 547 recoverable by Plaintiff under 11 U.S.C. § 550. These transfers are more particularly described on Exhibit "A" attached hereto and incorporated by reference as if fully set forth herein (the "Transfers").

25. The Transfers were made to or for the benefit of Defendant.

26. The Transfers were made for or on account of an antecedent debt owed by Debtors.

27. The Transfers were made while Debtors were insolvent.

28. The Transfers enabled Defendant to receive more than Defendant would have received if (i) Debtors' bankruptcy case were a case under Chapter 7 of the Bankruptcy Code; (ii) the Transfers had not been made; and (iii) Defendant received from the Debtors' Chapter 7 estate payment of the debts satisfied by the Transfers to the extent provided under Chapter 7 of the Bankruptcy Code.

29. Defendant is the "initial transferee" of the Transfers from Debtors, as that term is used in § 550(a) of the Bankruptcy Code.

30. The Transfers are avoidable preferences under 11 U.S.C. § 547(b). Plaintiff is entitled to recover the value of the Transfers from the Defendant under 11 U.S.C. § 550(a).

COUNT IV
AVOIDANCE AND RECOVERY OF PREFERENTIAL TRANSFERS UNDER AUTHORITY OF 11 U.S.C. § 544(B) AND K.R.S. 378.060

31. Paragraphs 1 through 30 above are incorporated herein by reference as if fully set forth herein.

32. Debtors filed for protection under chapter 11 of the Bankruptcy Code on February 28, 2001, the Original Petition Date.

33. During the six (6) month period immediately preceding the Original Petition Date (the "Kentucky Preference Period"), Defendant received certain transfers of interests of Debtors in property totaling $77,654.00 which were avoidable preferential transfers under K.R.S. 378.060 and recoverable by Plaintiff under said statute and 11 U.S.C. §§ 544(b) and 550. These transfers are more

particularly described on Exhibits "A" and "B" attached hereto and incorporated by reference as if fully set forth herein (the "Transfers").

34. The Transfers were made to or for the benefit of Defendant.

35. The Transfers were made for or on account of an antecedent debt.

36. The Transfers were made when the Debtors were in fact insolvent, and when the Debtors either knew they were insolvent or reasonably should have known they were insolvent.

37. The Transfers were made in contemplation of insolvency and with the design to prefer or favor the Defendant to the exclusion and detriment, in whole or in part, of other creditors.

38. Defendant is the "initial transferee" of the Transfers from Debtors, and is not a good faith purchaser for value.

39. The Transfers are avoidable preferences under K.R.S. 378.060. Plaintiff is entitled to recover the value of the Transfers from the Defendant under said statute as well as 11 U.S.C. §§ 544(b) and 550.

COUNT V
DISALLOWANCE OF CLAIMS

40. Paragraphs 1 through 39 above are incorporated herein by reference as if fully set forth herein.

41. Pursuant to 11 U.S.C. § 502(d), "the court shall disallow any claim of any entity from which property is

recoverable under section 542, 543, 550, or 553 of this title . . . unless such entity or transferee has paid the amount or turned over any such property, for which such entity or transferee is liable under section 522(i), 542, 543, 550, or 553 of this title."

42. Any claims of the Defendant asserted against the Debtors' estates should be disallowed until full payment and/or turnover of the amount of $108,063.00 is made to the Plaintiff.

WHEREFORE, Plaintiff respectfully requests that this Court enter Judgment against Defendant:

(a) For all amounts now due and owing in an amount not less than $30,409.00, together with interest at the statutory rate.

(b) Requiring the Defendant to turn over to the Plaintiff all sums due and owing to the Debtors pursuant to 11 U.S.C. § 542.

(c) Avoiding the Transfers pursuant to § 547(b) of the Bankruptcy Code and requiring Defendant to return the Transfers or the value of the Transfers in the amount of $25,595.00 pursuant to § 550(a) of the Bankruptcy Code, together with interest thereon as provided by law;

(d) Avoiding the Transfers pursuant to K.R.S. 378.060 and § 544(b) of the Bankruptcy Code and requiring Defendant to return the Transfers or the value of the Transfers in the amount of $77,654.00 pursuant to § 550(a) of the Bankruptcy Code, together with interest thereon as provided by law.

(e) Disallowing Defendant's pre-petition claims, whether secured or unsecured, in their entirety

pursuant to 11 U.S.C. § 502(d) until such time as the Defendant remits full payment to Plaintiff;

(f) Awarding Plaintiff reasonable attorneys' fees and costs incurred in the prosecution of this action; and

(g) Awarding Plaintiff such other legal or equitable relief as this Court deems appropriate.

DATED: _____

DINSMORE & SHOHL LLP
By: /s/ Sonja S. Keating
Sonja S. Keating
Grahmn N. Morgan
P. Anthony Sammons
Dinsmore & Shohl LLP
250 West Main Street, Suite 1400
Lexington, Kentucky 40507
(859) 425-1000

and

Kim Martin Lewis
Tim J. Robinson
Dinsmore & Shohl LLP
1900 Chemed Center
255 E. Fifth Street
Cincinnati, Ohio 45202
(513) 977-8200

Counsel for Plaintiff
Bernard Katz, Liquidating Supervisor

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION

In Re:	:	Chapter 11
WALLACE'S BOOKSTORES, INC., *et al.*,	:	Substantively Consolidated No. 01-50545
Debtors.	:	(Chief Judge William S. Howard)
BERNARD KATZ, LIQUIDATING SUPERVISOR FOR WALLACE'S BOOKSTORES, INC., *et al*	:	Adversary Proceeding No. 03-5081
Plaintiff,	:	
v.	:	
CENTRAL VIRGINIA COMMUNITY COLLEGE	:	
Defendant.	:	

SERVE: Dr. Darrel W. Staat, President
Central Virginia Community College
3506 Wards Road
Lynchburg, VA 24502

COMPLAINT TO AVOID AND RECOVER PREFERENTIAL TRANSFERS AND TO DISALLOW CLAIMS PURSUANT TO 11 U.S.C. §502

Plaintiff, Bernard Katz, Liquidating Supervisor for Wallace's Bookstores, Inc., by counsel, for his Complaint to Avoid and Recover Preferential Transfers against Defendant, Central Virginia Community College, respectfully states as follows:

JURISDICTION AND VENUE

1. The United States Bankruptcy Court for the Eastern District of Kentucky has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157 and 1334, and Federal Rule of Bankruptcy Procedure Rule 7001(1).

2. Venue is proper in this district under 28 U.S.C. § 1409.

3. The relief requested herein is a core proceeding pursuant to 28 U.S.C. § 157(b)(1) and (b)(2)(A), (E), and (O).

4. The statutory predicates for the relief requested herein are Sections 541, 544(b), 547(b), and 550 of the Bankruptcy Reform Act of 1978, 28 U.S.C. §§ 101-1330 (the "Bankruptcy Code"), and Kentucky Revised Statute 378.060.

5. Plaintiff is the duly appointed and approved Liquidating Supervisor in this matter.

6. Defendant is engaged in the business of retail sales of supplies and/or other services in the United States. Upon information and belief, Defendant is a resident of the United States.

FACTUAL BACKGROUND

7. On February 28, 2001 (the "Original Petition Date"), Wallace's Book Stores, Inc., filed for protection under Chapter 11 of Title 11 of the Bankruptcy Code. The bankruptcy case is being jointly administered by prior order of this Court as substantively consolidated Case No. 01-50545.

8. On March 20, 2002, the United States Bankruptcy Court for the Eastern District of Kentucky entered an "Order Confirming Second Amended Joint Consolidated Plan of Liquidation of Wallace's Bookstores, Inc. and Its Subsidiaries, and Wallace's Book Company, Inc., Debtors and Debtors-in-Possession," which Order approved the referenced Plan of Liquidation. The Plan of Liquidation provided for the appointment of a Liquidating Supervisor, who among other things, became the responsible party for the Debtors and became vested with the duties set forth in the Plan, including the duty to prosecute causes of action. Bernard Katz was appointed as Liquidating Supervisor and is thus the real party in interest as Plaintiff in this action.

9. Prior to the Original Petition Date and for some time thereafter, Debtors offered textbook buy-back and wholesale textbook distribution services and were collectively one of the nation's largest suppliers of new and used textbooks and college bookstore supplies throughout North America.

COUNT I
PAYMENT ON ACCOUNT

10. Paragraphs 1 through 9 above are incorporated herein by reference as if fully set forth herein.

11. Debtors fulfilled the Defendant's orders for goods by shipping the Sale Goods as requested by the Defendant.

12. The Defendant currently owes Debtors $4,898.00 for the Sale Goods.

13. Debtors have made demands, both orally and in writing, for payment in the amount of $4,898.00 for the Sale Goods.

14. Despite Debtors' efforts to collect the amount owed by the Defendant, that amount is now overdue, and the Defendant has refused to pay it.

15. Accordingly, Plaintiff [sic] are entitled to Judgment against the Defendant for $4,898.00, plus interest, attorneys' fees and costs incurred in collecting the amounts due from the Defendant.

COUNT II
TURNOVER OF PROPERTY OF THE ESTATE

16. Paragraphs 1 through 15 above, are incorporated herein by reference as if fully set forth herein.

17. Pursuant to 11 U.S.C. § 542, "an entity, other than a custodian, in possession, custody or control" of property of a debtor's estate must turn over and deliver such property or the value of such property to the debtor.

18. The amount owed to Debtors by the Defendant is property of Debtors' bankruptcy estate.

19. The Defendant is in possession of such property of Debtors' estate.

20. Such property is not of inconsequential value or benefit to Debtors' estate and to Debtors' creditors.

21. Accordingly, pursuant to Section 542(a) of the Bankruptcy Code, Plaintiff is entitled to an Order of the Court directing the Defendant to immediately turn over the sum of $4,898.00, plus interest, attorneys' fees and costs incurred.

COUNT III
AVOIDANCE AND RECOVERY OF PREFERENTIAL TRANSFERS UNDER AUTHORITY OF 11 U.S.C. § 547 AND 11 U.S.C. § 550

22. Paragraphs 1 through 21 above are incorporated herein by reference as if fully set forth herein.

23. Debtors filed for protection under chapter 11 of the Bankruptcy Code on February 28, 2001, the Original Petition Date.

24. During the ninety (90) day period immediately preceding the Original Petition Date (the "Code Preference Period"), Defendant received certain transfers of interest of Debtors in property totaling $63,387.00, which were avoidable preferential transfers under 11 U.S.C. § 547 recoverable by Plaintiff under 11 U.S.C. § 550.

25. The Transfers were made to or for the benefit of Defendant.

26. The Transfers were made for or on account of an antecedent debt owed by Debtors.

27. The Transfers were made while Debtors were insolvent.

28. The Transfers enabled Defendant to receive more than Defendant would have received if (i) Debtors' bankruptcy case were a case under Chapter 7 of the Bankruptcy Code; (ii) the Transfers had not been made; and (iii) Defendant received from the Debtors' Chapter 7 estate payment of the debts satisfied by the Transfers to the extent provided under Chapter 7 of the Bankruptcy Code.

29. Defendant is the "initial transferee" of the Transfers from Debtors, as that term is used in § 550(a) of the Bankruptcy Code.

30. The Transfers are avoidable preferences under 11 U.S.C. § 547(b). Plaintiff is entitled to recover the value of the Transfers from the Defendant under 11 U.S.C. § 550(a).

COUNT IV
DISALLOWANCE OF CLAIMS

31. Paragraphs 1 through 30 above are incorporated herein by reference as if fully set forth herein.

32. Pursuant to 11 U.S.C. § 502(d), "the court shall disallow any claim of any entity from which property is recoverable under section 542, 543, 550, or 553 of this title . . . unless such entity or transferee has paid the amount or turned over any such property, for which such entity or transferee is liable under section 522(i), 542, 543, 550, or 553 of this title."

33. Any claims of the Defendant asserted against the Debtors' estates should be disallowed until full payment and/or turnover of the amount of $68,285.00 is made to the Plaintiff.

WHEREFORE, Plaintiff respectfully requests that this Court enter Judgment against Defendant:

(a) For all amounts now due and owing in an amount not less than $4,898.00 together with interest at the statutory rate;

(b) Requiring the Defendant to turn over to the Plaintiff all sums due and owing to the Debtors pursuant to 11 U.S.C. § 542;

(c) Avoiding the Transfers pursuant to § 547(b) of the Bankruptcy Code and requiring Defendant to return the Transfers or the value of the Transfers in the amount of $63,387.00 pursuant to § 550(a)

of the Bankruptcy Code, together with interest thereon as provided by law;

(d) Disallowing Defendant's pre-petition claims, whether secured or unsecured, in their entirety pursuant to 11 U.S.C. § 502(d) until such time as the Defendant remits full payment to Plaintiff;

(e) Awarding Plaintiff reasonable attorneys' fees and costs incurred in the prosecution of this action; and

(f) Awarding Plaintiff such other legal or equitable relief as this Court deems appropriate.

DATED: February 12, 2003

DINSMORE & SHOHL LLP
By: /s/ Sonja S. Keating
Sonja S. Keating
Grahmn N. Morgan
P. Anthony Sammons
Dinsmore & Shohl LLP
250 West Main Street, Suite 1400
Lexington, Kentucky 40507
(859) 425-1000

and

Kim Martin Lewis
Tim J. Robinson
Dinsmore & Shohl LLP
1900 Chemed Center
255 E. Fifth Street
Cincinnati, Ohio 45202
(513) 977-8200

Counsel for Plaintiff,
Bernard Katz, Liquidating Supervisor

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION

In Re:	Chapter 11
WALLACE'S BOOKSTORES, INC., *et al.*,	Case Nos. 01-50545 (Substantively Consolidated)
Debtors.	(Chief Judge William S. Howard)
BERNARD KATZ, LIQUIDATING SUPERVISOR FOR WALLACE'S BOOKSTORES, INC., *et al*	Adversary Proceeding No. 03-_____
Plaintiff,	
v.	
BLUE RIDGE COMMUNITY COLLEGE (VA),	
Defendant.	

SERVE: Dr. James Perkins, President
Box 80, One College Lane
Weyers Cave, VA 24486

Blue Ridge Community College
C/O C. Tabor Cronk
900 East Main Street
Richmond, VA 23219-3513

Blue Ridge Community College
C/O Maureen Matsen
900 East Main Street
Richmond, VA 23219-3513

COMPLAINT FOR (1) PAYMENT ON ACCOUNT; (2) TURNOVER OF ESTATE PROPERTY PURSUANT TO 11 U.S.C. § 542; (3) AVOIDANCE AND RECOVERY OF PREFERENTIAL TRANSFERS; AND (4) DISALLOWANCE OF CLAIMS PURSUANT TO 11 U.S.C. §502

Plaintiff, Bernard Katz, Liquidating Supervisor for Wallace's Bookstores, Inc., by counsel, for his Complaint for (1) Payment on Account; (2) Turnover of Estate Property Pursuant to 11 U.S.C. § 542; (3) Avoidance and Recovery of Preferential Transfers; and (4) Disallowance of Claims pursuant to 11 U.S.C. §502 against Defendant, Blue Ridge CC (VA), respectfully states as follows:

JURISDICTION AND VENUE

1. The United States Bankruptcy Court for the Eastern District of Kentucky has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157 and 1334, and Federal Rule of Bankruptcy Procedure Rule 7001(1).

2. Venue is proper in this district under 28 U.S.C. § 1409.

3. The relief requested herein is a core proceeding pursuant to 28 U.S.C. § 157(b)(1) and (b)(2)(A), (B), (E), (L) and (O).

4. The statutory predicates for the relief requested herein are Sections 502, 541, 542, 544(b), 547(b), 550 and 1126 of the Bankruptcy Reform Act of 1978, 28 U.S.C. §§ 101-1330 (the "Bankruptcy Code").

5. Plaintiff is the duly appointed and approved Liquidating Supervisor in this matter.

6. Defendant, Blue Ridge Community College (VA) (hereinafter, "Defendant"), is engaged in the business of education services and/or retail sales of textbooks, supplies and/or services in the United States. Upon information and belief, Blue Ridge CC is a resident of the United States.

FACTUAL BACKGROUND

7. On February 28, 2001 (the "Original Petition Date"), Wallace's Book Stores, Inc., ("WBI"), Wallace's Book Company, Inc., ("WBC") and sixty (60) wholly-owned subsidiaries of WBI (the "Original Debtors") each filed for protection under Chapter 11 of Title 11 of the Bankruptcy Code. Each of the bankruptcy cases of the Original Debtors is being jointly administered by prior order of this Court as Case Nos. 01-50545 through 01-50606 (the "Original Cases"). On April 5, 2001 (the "New Petition Date"), seven additional wholly-owned subsidiaries of WBI (collectively, the "New Debtors"), each filed for protection under Chapter 11 of the Bankruptcy Code under Case Nos. 01-51059 through 01-51065 (the "New Cases"). On April 23, 2001, the Court entered an Order directing the joint administration of the New Cases with the Original Cases (collectively, the "Cases").

8. On March 20, 2002, the United States Bankruptcy Court for the Eastern District of Kentucky entered an "Order Confirming Second Amended Joint Consolidated Plan of Liquidation of Wallace's Bookstores, Inc. and Its Subsidiaries, and Wallace's Book Company, Inc., Debtors and Debtors-in-Possession," which Order approved the referenced Plan of Liquidation. The Plan of Liquidation provided for the appointment of a Liquidating Supervisor, who among other things, became the responsible party for

the Debtors and became vested with the duties set forth in the Plan, including the duty to prosecute causes of action. Bernard Katz was appointed as Liquidating Supervisor and is thus the real party in interest as Plaintiff in this action.

9. Prior to the Original Petition Date and for some time thereafter, Debtors offered textbook buy-back and wholesale textbook distribution services and were collectively one of the nation's largest suppliers of new and used textbooks and college bookstore supplies throughout North America.

10. Prior and subsequent to the Original Petition Date, Debtors supplied textbooks, trade books and miscellaneous course books, materials and other goods to the Defendant or to other entities or persons at the Defendant's direction. The Defendant's purchases from Debtors were on an open account basis.

11. During the ninety (90) day period immediately preceding the Petition Date (the "Code Preference Period"), Defendant received certain transfers of interests of the Debtors in property totaling $34,054.58 which were avoidable preferential transfers under 11 U.S.C. § 547 recoverable by Plaintiff under 11 U.S.C. § 550.

COUNT I
PAYMENT ON ACCOUNT

12. Paragraphs 1 through 4 above are incorporated herein by reference as if fully set forth herein.

13. Debtors fulfilled the Defendant's orders for goods by shipping sale goods as requested by the Defendant. A copy of the Debtor's current statement of accounts for the

Defendant (the "Statement") is attached hereto as Exhibit "A" and made a part hereof by reference.

14. The Defendant currently owes Debtors $35,317.61. *See* Exhibit A.

15. Debtors have made demands, both orally and in writing, for payment in the amount of $35,317.60 for the Sale of Goods. A copy of the demand letter sent to the Defendant is attached hereto as Exhibit "B" and made a part hereof by reference.

16. Despite Debtor's efforts to collect the amount owed by the Defendant, that amount is now overdue, and the Defendant has refused to pay it.

17. Accordingly, Plaintiff [sic] is entitled to a judgment against the Defendant for $35,317.60, plus interest, attorneys' fees and costs incurred by Plaintiffs in collecting the amounts due from the Defendant.

COUNT II
TURNOVER OF PROPERTY OF THE ESTATE

18. Paragraphs 1 through 17 above, are incorporated herein by reference as if fully set forth herein.

19. Pursuant to 11 U.S.C. § 542, "an entity, other than a custodian, in possession, custody or control" of property of a debtor's estate must turn over and deliver such property or the value of such property to the debtor.

20. The amount owed to Debtors and the Plaintiff by the Defendant is property of Debtors' bankruptcy estate.

21. The Defendant is in possession of such property of Debtors' estate.

22. Such property is not of inconsequential value or benefit to Debtors' estate and to Debtors' creditors.

23. Accordingly, pursuant to Section 542(a) of the Bankruptcy Code, Plaintiff is entitled to an Order of the Court directing the Defendant to immediately turn over the sum of $35,317.60, plus interest, attorneys' fees and costs incurred.

COUNT III
AVOIDANCE AND RECOVERY OF PREFERENTIAL TRANSFERS UNDER AUTHORITY OF 11 U.S.C. § 547 AND 11 U.S.C. § 550

24. Paragraphs 1 through 23 above are incorporated herein by reference as if fully set forth herein.

25. Debtors filed for protection under chapter 11 of the Bankruptcy Code on February 28, 2001, the Original Petition Date.

26. During the ninety (90) day period immediately preceding the Petition Date (the "Code Preference Period"), Defendant received certain transfers of interests of Debtors in property totaling $34,054.58 which were avoidable preferential transfers under 11 U.S.C. § 547 recoverable by Plaintiff under 11 U.S.C. § 550. These transfers are more particularly described on Exhibit "C" attached hereto and incorporated by reference as if fully set forth herein (the "Transfers").

27. The Transfers were made to or for the benefit of Defendant.

28. The Transfers were made for or on account of an antecedent debt owed by Debtors.

29. The Transfers were made while Debtors were insolvent.

30. The Transfers enabled Defendant to receive more than Defendant would have received if (i) Debtors' bankruptcy case were a case under Chapter 7 of the Bankruptcy Code; (ii) the Transfers had not been made; and (iii) Defendant received from the Debtors' Chapter 7 estate payment of the debts satisfied by the Transfers to the extent provided under Chapter 7 of the Bankruptcy Code.

31. Defendant is the "initial transferee" of the Transfers from Debtors, as that term is used in § 550(a) of the Bankruptcy Code.

32. The Transfers are avoidable preferences under 11 U.S.C. § 547(b). Plaintiff is entitled to recover the value of the Transfers from the Defendant under 11 U.S.C. § 550(a).

COUNT IV
AVOIDANCE AND RECOVERY OF PREFERENTIAL TRANSFERS UNDER AUTHORITY OF 11 U.S.C. § 544(b) AND K.R.S. 378.060

33. Paragraphs 1 through 25 above are incorporated herein by reference as if fully set forth herein.

34. During the six (6) month period immediately preceding the Petition Date (the "Kentucky Preference Period"), Defendant received certain transfers of interests of Debtors in property totaling $35,312.50 (which includes those Transfers more particularly described in numerical paragraph 26 above) which were avoidable preferential transfers under K.R.S. 378.060 and recoverable by Plaintiff under said statute and 11 U.S.C. §§ 544(b) and 550.

These transfers are more particularly described in Exhibit "D" attached hereto (the Transfers").

35. The Transfers was made to or for the benefit of Defendant.

36. The Transfers was made for or on account of an antecedent debt.

37. The Transfers was made when the Debtors were in fact insolvent, and when the Debtors either knew they were insolvent or reasonably should have known they were insolvent.

38. The Transfers was made in contemplation of insolvency and with the design to prefer or favor the Defendant to the exclusion and detriment, in whole or in part, of other creditors.

39. Defendant is the "initial transferee" of the Transfers from Debtors, and is not a good faith purchaser for value.

40. The Transfers are an avoidable preference under K.R.S. 378.060. Plaintiff is entitled to recover the value of the Transfers from the Defendant under said statute as well as 11 U.S.C. §§ 544(b) and 550.

COUNT V
DISALLOWANCE OF CLAIMS

41. Paragraphs 1 through 40 above are incorporated herein by reference as if fully set forth herein.

42. Pursuant to 11 U.S.C. § 502(d), "the court shall disallow any claim of any entity from which property is recoverable under section 542, 543, 550, or 553 of this title

. . . unless such entity or transferee has paid the amount or turned over any such property, for which such entity or transferee is liable under section 522(i), 542, 543, 550, or 553 of this title."

43. Any claims of the Defendant asserted against the Debtors' estates should be disallowed until full payment and/or turnover of the amount of $70,630.20 is made to the Plaintiff.

WHEREFORE, Plaintiff respectfully requests that this Court enter a judgment against Blue Ridge CC (VA):

(a) For all amounts now due and owing in an amount not less than $35,317.60, together with interest at the statutory rate;

(b) Requiring the Defendant to turn over to the Plaintiff all sums due and owing to the Debtors pursuant to 11 U.S.C. § 542;

(c) Avoiding the Transfers pursuant to § 547(b) of the Bankruptcy Code and requiring Defendant to return the Transfers or the value of the Transfers in the amount of $34,054.58 pursuant to § 550(a) of the Bankruptcy Code, together with interest thereon as provided by law;

(d) Avoiding the Transfers pursuant to K.R.S. 378.060 and § 544(b) of the Bankruptcy Code and requiring Defendant to return the Transfers or the value of the Transfer in the amount of $35,312.50 (which includes those Transfers more particularly described in paragraph c above) pursuant to § 550(a) of the Bankruptcy Code, together with interest thereon as provided by law;

(e) Disallowing Defendant's prepetition claims, whether secured or unsecured, in their entirety

pursuant to 11 U.S.C. § 502(d) until such time as the Defendant remits full payment to Plaintiff;

(f) Awarding Plaintiff reasonable attorneys' fees and costs incurred in the prosecution of this action; and

(g) Awarding Plaintiff such other legal or equitable relief as this Court deems appropriate.

DATED: Lexington, Kentucky
February 14, 2003

DINSMORE & SHOHL LLP
By: /s/ Grahmn N. Morgan
Grahmn N. Morgan
Anthony P. Sammons
Sonja S. Keating
Dinsmore & Shohl LLP
250 West Main Street, Suite 1400
Lexington, Kentucky 40507
(859) 425-1000

and

Kim Martin Lewis
Tim J. Robinson
Dinsmore & Shohl LLP
1900 Chemed Center
255 E. Fifth Street
Cincinnati, Ohio 45202
(513) 977-8200

Counsel for Plaintiff
Bernard Katz, Liquidating Supervisor for Wallace's Bookstores, Inc., et al

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF KENTUCKY LEXINGTON DIVISION

In Re:	:	Chapter 11
WALLACE'S BOOKSTORES, INC., *et al.*,	:	Substantively Consolidated No. 01-50545
Debtors.	:	(Chief Judge William S. Howard)
BERNARD KATZ, LIQUIDATING SUPERVISOR FOR WALLACE'S BOOKSTORES, INC., *et al*	:	Adversary Proceeding No. 03-5041
Plaintiff,	:	
v.	:	
NEW RIVER COMMUNITY COLLEGE	:	
Defendant.	:	

SERVE: Dr. Jack M. Lewis, President
New River Community College
5251 College Drive
Dublin, VA 24084

AMENDED COMPLAINT TO AVOID AND RECOVER PREFERENTIAL TRANSFERS AND TO DISALLOW CLAIMS PURSUANT TO 11 U.S.C. §502

Plaintiff, Bernard Katz, Liquidating Supervisor for Wallace's Bookstores, Inc., by counsel, for his Amended Complaint to Avoid and Recover Preferential Transfers against Defendant, New River Community College, respectfully states as follows:

JURISDICTION AND VENUE

1. The United States Bankruptcy Court for the Eastern District of Kentucky has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157 and 1334, and Federal Rule of Bankruptcy Procedure Rule 7001(1).

2. Venue is proper in this district under 28 U.S.C. § 1409.

3. The relief requested herein is a core proceeding pursuant to 28 U.S.C. § 157(b)(1) and (b)(2)(A), (E), and (O).

4. The statutory predicates for the relief requested herein are Sections 541, 544(b), 547(b), and 550 of the Bankruptcy Reform Act of 1978, 28 U.S.C. §§ 101-1330 (the "Bankruptcy Code"), and Kentucky Revised Statute 378.060.

5. Plaintiff is the duly appointed and approved Liquidating Supervisor in this matter.

6. Defendant is engaged in the business of retail sales of supplies and/or other services in the United States. Upon information and belief, Defendant is a resident of the United States.

FACTUAL BACKGROUND

7. On February 28, 2001 (the "Original Petition Date"), Wallace's Book Stores, Inc., filed for protection under Chapter 11 of Title 11 of the Bankruptcy Code. The bankruptcy case is being jointly administered by prior order of this Court as substantively consolidated Case No. 01-50545.

8. On March 20, 2002, the United States Bankruptcy Court for the Eastern District of Kentucky entered an "Order Confirming Second Amended Joint Consolidated Plan of Liquidation of Wallace's Bookstores, Inc. and Its Subsidiaries, and Wallace's Book Company, Inc., Debtors and Debtors-in-Possession," which Order approved the referenced Plan of Liquidation. The Plan of Liquidation provided for the appointment of a Liquidating Supervisor, who among other things, became the responsible party for the Debtors and became vested with the duties set forth in the Plan, including the duty to prosecute causes of action. Bernard Katz was appointed as Liquidating Supervisor and is thus the real party in interest as Plaintiff in this action.

9. Prior to the Original Petition Date and for some time thereafter, Debtors offered textbook buy-back and wholesale textbook distribution services and were collectively one of the nation's largest suppliers of new and used textbooks and college bookstore supplies throughout North America.

COUNT I
PAYMENT ON ACCOUNT

10. Paragraphs 1 through 9 above are incorporated herein by reference as if fully set forth herein.

11. Sometime prior to the filing of the bankruptcy petitions herein, Debtors had entered into a bookstore lease agreement with Defendant.

12. Under the terms of the lease agreement, the Debtors operated a book store establishment on Defendant's premises, and in exchange, paid to the Defendant a

monthly lease fee in an amount equal to a stated percentage of monthly sales or a stated minimum monthly payment.

13. During a period of time before and following the initial filing of petitions in this matter, Debtors continued to operate the book store under the terms of the lease agreement, as tenant and as Debtors-in-Possession, and in the course of this activity, tendered lease payments to the Defendant which exceeded the amounts actually owed under the lease agreement.

14. During this same time, additional payments Defendant owed to the Debtors under the lease agreement continued to accrue.

15. Additionally, Debtors fulfilled the Defendant's orders for goods by shipping Sale Goods as requested by the Defendant. A copy of the Debtors' current statement of accounts for the Defendant (the "Statement") is attached hereto as Exhibit "A" and made a part hereof by reference.

16. The Defendant currently owes Debtors $97,249.61 for the Sale Goods and accrued lease liability.

17. Debtors have made demands, both orally and in writing, for payment in the amount of $97,249.61 for the amounts owed.

18. Despite Debtors' efforts to collect the amount owed by the Defendant, that amount is now overdue, and the Defendant has refused to pay it.

19. Accordingly, Plaintiff [sic] is entitled to Judgment against the Defendant for $97,249.61, plus interest, attorneys' fees and costs incurred in collecting the amounts due from the Defendant.

COUNT II
TURNOVER OF PROPERTY OF THE ESTATE

20. Paragraphs 1 through 19 above, are incorporated herein by reference as if fully set forth herein.

21. Pursuant to 11 U.S.C. § 542, "an entity, other than a custodian, in possession, custody or control" of property of a debtor's estate must turn over and deliver such property or the value of such property to the debtor.

22. The amount owed to Debtors by the Defendant is property of Debtors' bankruptcy estate.

23. The Defendant is in possession of such property of Debtors' estate.

24. Such property is not of inconsequential value or benefit to Debtors' estate and to Debtors' creditors.

25. Accordingly, pursuant to Section 542(a) of the Bankruptcy Code, Plaintiff is entitled to an Order of the Court directing the Defendant to immediately turn over the sum of $97,249.61, plus interest, attorneys' fees and costs incurred.

COUNT III
AVOIDANCE AND RECOVERY OF PREFERENTIAL TRANSFERS UNDER AUTHORITY OF 11 U.S.C. § 547 AND 11 U.S.C. § 550

26. Paragraphs 1 through 25 above are incorporated herein by reference as if fully set forth herein.

27. Debtors filed for protection under chapter 11 of the Bankruptcy Code on February 28, 2001, the Original Petition Date.

28. During the ninety (90) day period immediately preceding the Original Petition Date (the "Code Preference Period"), Defendant received certain transfers of interest of Debtors in property totaling $65,264.00, which were avoidable preferential transfers under 11 U.S.C. § 547 recoverable by Plaintiff under 11 U.S.C. § 550. These transfers are more particularly described on Exhibit "B" attached hereto and incorporated by reference as if fully set forth herein (the "Transfers").

29. The Transfers were made to or for the benefit of Defendant.

30. The Transfers were made for or on account of an antecedent debt owed by Debtors.

31. The Transfers were made while Debtors were insolvent.

32. The Transfers enabled Defendant to receive more than Defendant would have received if (i) Debtors' bankruptcy case were a case under Chapter 7 of the Bankruptcy Code; (ii) the Transfers had not been made; and (iii) Defendant received from the Debtors' Chapter 7 estate payment of the debts satisfied by the Transfers to the extent provided under Chapter 7 of the Bankruptcy Code.

33. Defendant is the "initial transferee" of the Transfers from Debtors, as that term is used in § 550(a) of the Bankruptcy Code.

34. The Transfers are avoidable preferences under 11 U.S.C. § 547(b). Plaintiff is entitled to recover the value of the Transfers from the Defendant under 11 U.S.C. § 550(a).

COUNT IV
DISALLOWANCE OF CLAIMS

35. Paragraphs 1 through 34 above are incorporated herein by reference as if fully set forth herein.

36. Pursuant to 11 U.S.C. § 502(d), "the court shall disallow any claim of any entity from which property is recoverable under section 542, 543, 550, or 553 of this title . . . unless such entity or transferee has paid the amount or turned over any such property, for which such entity or transferee is liable under section 522(i), 542, 543, 550, or 553 of this title,"

37. Any claims of the Defendant asserted against the Debtors' estates should be disallowed until full payment and/or turnover of the amount of $162,513.61 is made to the Plaintiff.

WHEREFORE, Plaintiff respectfully requests that this Court enter Judgment against Defendant:

(a) For all amounts now due and owing in an amount not less than $97,249.61, together with interest at the statutory rate;

(b) Requiring the Defendant to turn over to the Plaintiff all sums due and owing to the Debtors pursuant to 11 U.S.C. § 542;

(c) Avoiding the Transfers pursuant to § 547(b) of the Bankruptcy Code and requiring Defendant to return the Transfers or the value of the Transfers in the amount of $65,264.00 pursuant to § 550(a) of the Bankruptcy Code, together with interest thereon as provided by law;

(d) Disallowing Defendant's pre-petition claims, whether secured or unsecured, in their entirety

pursuant to 11 U.S.C. § 502(d) until such time as the Defendant remits full payment to Plaintiff;

(e) Awarding Plaintiff reasonable attorneys' fees and costs incurred in the prosecution of this action; and

(f) Awarding Plaintiff such other legal or equitable relief as this Court deems appropriate.

DATED: February 25, 2003

DINSMORE & SHOHL LLP
By: /s/ Sonja S. Keating
Sonja S. Keating
Grahmn N. Morgan
P. Anthony Sammons
Dinsmore & Shohl LLP
250 West Main Street, Suite 1400
Lexington, Kentucky 40507
(859) 425-1000

and

Kim Martin Lewis
Tim J. Robinson
Dinsmore & Shohl LLP
1900 Chemed Center
255 E. Fifth Street
Cincinnati, Ohio 45202
(513) 977-8200

Counsel for Plaintiff
Bernard Katz, Liquidating Supervisor

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
(Lexington Division)

IN RE: WALLACE'S BOOKSTORES, INC., et al.	CASE NO. 01-50545
DEBTORS	
BERNARD KATZ, LIQUIDATING SUPERVISOR FOR WALLACE'S BOOKSTORES, INC., et al.	PLAINTIFF
V.	ADV. NO. 03-5068
VIRGINIA MILITARY INSTITUTE	DEFENDANT

ORDER MODIFYING ORDER DENYING DEFENDANT'S MOTION TO DISMISS

By Order of April 24, 2003, the Court overruled Defendant's Motion to Dismiss raising the sovereign immunity of the Commonwealth of Virginia, and required Defendant to file its answer to the Complaint within ten days thereafter. The Defendant moved for relief from the requirement that it make answer to the Complaint, provided that it appealed from the denial of its Motion to Dismiss within the permitted time. The Court having heard the arguments of the parties on May 15, 2003, and being otherwise sufficiently advised,

IT IS HEREBY ORDERED AND ADJUDGED that Defendant's Motion is sustained to the extent that the Defendant is granted an extension of time in which to file an Answer, but is otherwise overruled. The Court's Order of April 24, 2003 is hereby modified as follows:

1. This is a core proceeding and this Court has jurisdiction to enter this Order pursuant to 28 U.S.C. §§ 157 and 1334.

2. Congress, through its enactment of 11 U.S.C. § 106(a), expressly and within its Constitutional authority, abrogated the states' Eleventh Amendment immunity.

3. Defendant's Motion to Dismiss is hereby DENIED.

4. Defendant shall have fifteen (15) days from the date of entry of this Order in which to file an Answer to the Adversary Complaint.

5. This Order modifies and supersedes the Order entered on April 24, 2003.

[SEAL]
Signed By:
William S. Howard
Bankruptcy Judge
Dated: Monday, May 19, 2003
(wsh)

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
(Lexington Division)

IN RE:
WALLACE'S BOOKSTORES,
INC., *et al.*

DEBTORS — CASE NO. 01-50545

BERNARD KATZ, LIQUIDATING
SUPERVISOR FOR WALLACE'S
BOOKSTORES, INC., *et al.* — PLAINTIFF

V. — ADV. NO. 03-5081

CENTRAL VIRGINIA COMMUNITY
COLLEGE — DEFENDANT

ORDER MODIFYING ORDER DENYING DEFENDANT'S MOTION TO DISMISS

By Order of April 24, 2003, the Court overruled Defendant's Motion to Dismiss raising the sovereign immunity of the Commonwealth of Virginia, and required Defendant to file its answer to the Complaint within ten days thereafter. The Defendant moved for relief from the requirement that it make answer to the Complaint, provided that it appealed from the denial of its Motion to Dismiss within the permitted time. The Court having heard the arguments of the parties on May 15, 2003, and being otherwise sufficiently advised,

IT IS HEREBY ORDERED AND ADJUDGED that Defendant's Motion is sustained to the extent that the Defendant is granted an extension of time in which to file an Answer, but is otherwise overruled. The Court's Order of April 24, 2003 is hereby modified as follows:

1. This is a core proceeding and this Court has jurisdiction to enter this Order pursuant to 28 U.S.C. §§ 157 and 1334.

2. Congress, through its enactment of 11 U.S.C. §106(a), expressly and within its Constitutional authority, abrogated the states' Eleventh Amendment immunity.

3. Defendant's Motion to Dismiss is hereby DENIED.

4. This is a final and appealable Order.

5. Defendant will [sic] fifteen (15) days from the date of entry of this Order in which to file an Answer to the Adversary Complaint, and ten (10) days from the entry of this Order in which to file a Notice of Appeal.

6. This Order modifies and supersedes the Order entered on April 24, 2003.

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
(Lexington Division)

IN RE: WALLACE'S BOOKSTORES, INC., et al.	CASE NO. 01-50545
DEBTORS	
BERNARD KATZ, LIQUIDATING SUPERVISOR FOR WALLACE'S BOOKSTORES, INC., et al.	PLAINTIFF
V.	ADV. NO. 03-5093
BLUE RIDGE COMMUNITY COLLEGE	DEFENDANT

ORDER MODIFYING ORDER DENYING DEFENDANT'S MOTION TO DISMISS

By Order of April 24, 2003, the Court overruled Defendant's Motion to Dismiss raising the sovereign immunity of the Commonwealth of Virginia, and required Defendant to file its answer to the Complaint within ten days thereafter. The Defendant moved for relief from the requirement that it make answer to the Complaint, provided that it appealed from the denial of its Motion to Dismiss within the permitted time. The Court having heard the arguments of the parties on May 15, 2003, and being otherwise sufficiently advised,

IT IS HEREBY ORDERED AND ADJUDGED that Defendant's Motion is sustained to the extent that the Defendant is granted an extension of time in which to file an Answer, but is otherwise overruled. The Court's Order of April 24, 2003 is hereby modified as follows:

1. This is a core proceeding and this Court has jurisdiction to enter this Order pursuant to 28 U.S.C. §§ 157 and 1334.

2. Congress, through its enactment of 11 U.S.C. § 106(a), expressly and within its Constitutional authority, abrogated the states' Eleventh Amendment immunity.

3. Defendant's Motion to Dismiss is hereby DENIED.

4. This is a final and appealable Order.

5. Defendant will [sic] fifteen (15) days from the date of entry of this Order in which to file an Answer to the Adversary Complaint, and ten (10) days from the entry of this Order in which to file a Notice of Appeal.

6. This Order modifies and supersedes the Order entered on April 24, 2003.

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
(Lexington Division)

IN RE: WALLACE'S BOOKSTORES, INC., et al.	CASE NO. 01-50545
DEBTORS	
BERNARD KATZ, LIQUIDATING SUPERVISOR FOR WALLACE'S BOOKSTORES, INC., et al.	PLAINTIFF
V.	ADV. NO. 03-5093 41
NEW RIVER COMMUNITY COLLEGE	DEFENDANT

ORDER MODIFYING ORDER DENYING DEFENDANT'S MOTION TO DISMISS

By Order of April 24, 2003, the Court overruled Defendant's Motion to Dismiss raising the sovereign immunity of the Commonwealth of Virginia, and required Defendant to file its answer to the Complaint within ten days thereafter. The Defendant moved for relief from the requirement that it make answer to the Complaint, provided that it appealed from the denial of its Motion to Dismiss within the permitted time. The Court having heard the arguments of the parties on May 15, 2003, and being otherwise sufficiently advised,

IT IS HEREBY ORDERED AND ADJUDGED that Defendant's Motion is sustained to the extent that the Defendant is granted an extension of time in which to file an Answer, but is otherwise overruled. The Court's Order of April 24, 2003 is hereby modified as follows:

1. This is a core proceeding and this Court has jurisdiction to enter this Order pursuant to 28 U.S.C. §§ 157 and 1334.

2. Congress, through its enactment of 11 U.S.C. § 106(a), expressly and within its Constitutional authority, abrogated the states' Eleventh Amendment immunity.

3. Defendant's Motion to Dismiss is hereby DENIED.

4. This is a final and appealable Order.

5. Defendant will [sic] fifteen (15) days from the date of entry of this Order in which to file an Answer to the Adversary Complaint, and ten (10) days from the entry of this Order in which to file a Notice of Appeal.

6. This Order modifies and supersedes the Order entered on April 24, 2003.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 03-245-KSF*

IN RE
WALLACE'S BOOKSTORES,
INC., *et al.* DEBTORS
BANKRUPTCY CASE NO.
01-50545

CENTRAL VIRGINIA COMMUNITY COLLEGE APPELLANT

V.

ORDER

(Filed Aug. 6, 2003)

BERNARD KATZ, LIQUIDATING
SUPERVISOR FOR WALLACE'S
BOOKSTORES, INC., *et al.* APPELLEE

ADVERSARY PROCEEDING NO. 03-5081

* * *

This matter is before the Court on appeal from several orders of the United States Bankruptcy Court for the Eastern District of Kentucky in the underlying adversary proceedings in this consolidated action denying the

* This case has been consolidated with three related cases, with the present action as the lead case: *Virginia Military Institute v. Katz*, Civil Action No. 03-246-KSF (E.D. Ky.), *New River Community College v. Katz*, Civil Action No. 03-247-KSF (E.D. Ky.), and *Blue Ridge Community College v. Katz*, Civil Action No. 03-248-KSF (E.D. Ky.). For ease of reference, the Court will use the caption only for the lead action in its orders, although the orders apply equally to all parties in each of the consolidated cases.

appellants' motions to dismiss on the basis of sovereign immunity.

The appellants have sufficiently outlined the factual background and procedural history of these cases in their consolidated brief and, therefore, the Court will not repeat the same here. The constitutional issues raised by the appellants herein are identical to the issues raised by the appellants in *Hood v. Tennessee Student Assistance Corp.*, 319 F.3d 755 (6th Cir. 2003), *petition for cert. filed* No. 02-1606 (May 6, 2003). Thus, this Court must reject the appellants' appeal for the reasons set forth in the *Hood* decision and affirms the rulings of the bankruptcy court. Based on this, there is no need for the Court to address the argument of appellant Virginia Military Institute that the bankruptcy court erred in ruling that it had waived sovereign immunity by filing a proof of claim in the main bankruptcy case.

Accordingly, the Court, being otherwise fully and sufficiently advised, HEREBY ORDERS that

(1) the orders of the United States Bankruptcy Court for the Eastern District of Kentucky entered April 24, 2003, and May 19, 2003, are AFFIRMED; and

(2) judgment will be entered contemporaneously with this order.

This 5/day of August, 2003.

/s/ Karl S. Forester
KARL S. FORESTER,
CHIEF JUDGE

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 03-6054

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

In re: WALLACE'S BOOKSTORE, INC. and WALLACE'S BOOK COMPANY Debtors	)	
BERNARD KATZ, Liquidating Supervisor for Wallace's Bookstores, Inc., et al., Appellee, v. CENTRAL VIRGINIA COMMUNITY COLLEGE; VIRGINIA MILITARY INSTITUTE; NEW RIVER COMMUNITY COLLEGE; BLUE RIDGE COMMUNITY COLLEGE, Appellants.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY (Filed Aug. 4, 2004)

Before: SUTTON and COOK, Circuit Judges; ROSEN, District Judge.*

* The Honorable Gerald E. Rosen, United States District Judge for the Eastern District of Michigan, sitting by designation.

PER CURIAM. Appellants, four state-supported institutions of higher education in Virginia, brought this suit for the purpose of challenging this court's decision in *Hood v. Tennessee Student Assistance Corporation*, 319 F.3d 755 (6th Cir. 2003) (holding that the Article I Bankruptcy Clause grants Congress the authority to abrogate states' sovereign immunity), *aff'd on other grounds*, 124 S. Ct. 45 (2004). The district court, finding that appellants raised the very arguments that this court rejected in *Hood*, affirmed the orders of the bankruptcy court. Because we are bound to follow a decision of a prior panel, *see Moltan Co. v. Eagle-Picher Indus., Inc.*, 55 F.3d 1171, 1176 (6th Cir. 1995) ("We cannot overturn the prior published decision of another panel and are therefore bound by these previous decisions."), and because the parties agree that *Hood* applies here, we affirm the judgment of the district court.

No. 03-6054

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

N RE: WALLACE'S BOOKSTORE, INC. AND WALLACE'S BOOK COMPANY, Debtors.	)	ORDER (Filed Sep. 30, 2004)
BERNARD KATZ, LIQUIDATING SUPERVISOR FOR WALLACE'S BOOKSTORES, INC., ET AL., Appellee, v. CENTRAL VIRGINIA COMMUNITY COLLEGE, ET AL., Appellants.	)	

BEFORE: SUTTON and COOK, Circuit Judges; and ROSEN,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

* Hon. Gerald E. Rosen, United States District Judge for the Eastern District of Michigan, sitting by designation.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

(5)

Supreme Court, U.S.
FILED
JUN 17 2005
OFFICE OF THE CLERK

No. 04-885

In The Supreme Court Of The United States

CENTRAL VIRGINIA COMMUNITY COLLEGE,
VIRGINIA MILITARY INSTITUTE,
NEW RIVER COMMUNITY COLLEGE, and
BLUE RIDGE COMMUNITY COLLEGE,
Petitioners,

v.

BERNARD KATZ, Liquidating Supervisor for
Wallace's Bookstores, Inc.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF OHIO AND 48 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

JIM PETRO
Attorney General of Ohio
DOUGLAS R. COLE
State Solicitor
ELISE W. PORTER*
Assistant Solicitor
**Counsel of Record*
30 East Broad Street, 17th Floor
Columbus, OH 43215-3400
614-466-8980
614-466-5087 fax

Counsel for *Amici* States

TROY KING
Attorney General
State of Alabama

DAVID W. MARQUEZ
Attorney General
State of Alaska

TERRY GODDARD
Attorney General
State of Arizona

MIKE BEEBE
Attorney General
State of Arkansas

BILL LOCKYER
Attorney General
State of California

JOHN W. SUTHERS
Interim Attorney General
State of Colorado

RICHARD BLUMENTHAL
Attorney General
State of Connecticut

M. JANE BRADY
Attorney General
State of Delaware

CHARLES J. CRIST JR.
Attorney General
State of Florida

THURBERT E. BAKER
Attorney General
State of Georgia

MARK J. BENNETT
Attorney General
State of Hawaii

LAWRENCE G. WASDEN
Attorney General
State of Idaho

LISA MADIGAN
Attorney General
State of Illinois

STEVE CARTER
Attorney General
State of Indiana

THOMAS J. MILLER
Attorney General
State of Iowa

PHILL KLINE
Attorney General
State of Kansas

GREGORY D. STUMBO
Attorney General
Commonwealth of
Kentucky

CHARLES C. FOTI, JR.
Attorney General
State of Louisiana

G. STEVEN ROWE
Attorney General
State of Maine

J. JOSEPH CURRAN, JR.
Attorney General
State of Maryland

THOMAS F. REILLY
Attorney General
Commonwealth of
Massachusetts

MICHAEL A. COX
Attorney General
State of Michigan

MIKE HATCH
Attorney General
State of Minnesota

JIM HOOD
Attorney General
State of Mississippi

JEREMIAH W. (JAY) NIXON
Attorney General
State of Missouri

MIKE MCGRATH
Attorney General
State of Montana

JON BRUNING
Attorney General
State of Nebraska

BRIAN SANDOVAL
Attorney General
State of Nevada

KELLY A. AYOTTE
Attorney General
State of New Hampshire

PETER C. HARVEY
Attorney General
State of New Jersey

PATRICIA A. MADRID
Attorney General
State of New Mexico

ELIOT SPITZER
Attorney General
State of New York

ROY COOPER
Attorney General
State of North Carolina

WAYNE STENEHJEM
Attorney General
State of North Dakota

W.A. DREW EDMONDSON
Attorney General
State of Oklahoma

HARDY MYERS
Attorney General
State of Oregon

THOMAS W. CORBETT JR.
Attorney General
Commonwealth of
Pennsylvania

PATRICK C. LYNCH
Attorney General
State of Rhode Island

HENRY DARGAN
MCMASTER
Attorney General
State of South Carolina

LAWRENCE E. LONG
Attorney General
State of South Dakota

PAUL G. SUMMERS
Attorney General
State of Tennessee

GREG ABBOTT
Attorney General
State of Texas

MARK L. SHURTLEFF
Attorney General
State of Utah

WILLIAM H. SORRELL
Attorney General
State of Vermont

ROB MCKENNA
Attorney General
State of Washington

DARRELL V. MCGRAW JR.
Attorney General
State of West Virginia

PEGGY A.
LAUTENSCHLAGER
Attorney General
State of Wisconsin

PATRICK J. CRANK
Attorney General
State of Wyoming

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF *AMICI* INTEREST 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

A. The early history of the Constitution illustrates that the founders distinguished the sovereign power of the States from the sovereign immunity of the states in the context of bankruptcy. 7

B. The early history of bankruptcy, together with modern case law, illustrate that the States retain sovereign immunity regardless of the extent of the power ceded to Congress. 11

C. The early history of bankruptcy reveals no established practice of subjecting States to suit in bankruptcy. 13

D. A bankruptcy court's *in rem* jurisdiction does not extend to "an adversary proceeding by the bankruptcy trustee seeking to recover property in the hands of the State on the grounds that the transfer was a voidable preference." 16

CONCLUSION 19

TABLE OF AUTHORITIES

Cases **Page**

Alden v. Maine,
527 U.S. 706 (1999) ..... *passim*

Atascadero State Hospital v. Scanlon,
473 U.S. 234 (1985) 5, 9

Bd. of Trustees v. Garrett,
531 U.S. 356 (2001) 6

Blatchford v. Native Village of Noatak,
501 U.S. 775 (1991) 8, 14

Camps Newfound/Owatonah v. Town of Harrison,
520 U.S. 564 (1997) 13

Chisholm v. Georgia,
2 U.S. (Dall.) 419 (1793) 10, 11, 15

College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.,
527 U.S. 666 (1999) 6, 13

Commonwealth v. Hutchinson,
10 Pa. 466 (1849) 14

Connecticut v. Shelton,
47 Conn. 400 (1879) 14

Dep't of Transp. & Dev. v. PNL Asset Mgmt. Co. LLC (In re Fernandez),
123 F.3d 241 (5th Cir. 1997) 4

Federal Maritime Comm'n v. South Carolina Ports Auth.,
535 U.S. 743 (2002) 6

Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank, 527 U.S. 627 (1999) 6

Geery's Appeal,
43 Conn. 289 (1876) 12

Georgia Higher Educ. Assistance Corp. v. Crow (In re Crow),
2004 U.S. App. Lexis 26872 4

Gibbons v. Ogden,
22 U.S. (9 Wheat.) 1 (1824) 11

Griswold v. Pratt,
50 Mass. 16 (1845) 13

Hanover Nat'l Bank v. Moyses,
186 U.S. 181, 192 (1902) 17

Hans v. Louisiana,
134 U.S. 1 (1890) 3, 10, 14, 15

Hoffman v. Connecticut Dep't of Income Maintenance,
492 U.S. 96 (1989) 4, 18

Hood v. Tennessee Student Assistance Corp. (In re Hood), (Hood I)
319 F.3d 755 (6th Cir. 2003) 4, 5, 8, 9

Idaho v. Coeur d'Alene Tribe,
521 U.S. 261 (1997) 6, 18

John McConologue's Case,
107 Mass. 154 (1871) 13

Kimel v. Florida Bd. of Regents,
528 U.S. 62 (2000) 6

McCulloch v. Maryland,
17 U.S. (4 Wheat.) 316 (1819) 11

Mitchell v. Franchise Tax Bd. (*In re Mitchell*),
209 F.3d 1111 (9th Cir. 2000) 4

Nelson v. Lacrosse Co. Dist. Atty. (*In re Nelson*),
301 F.3d 820 (7th Cir. 2002) 4

Ogden v. Saunders,
25 U.S. (12 Wheat.) 213 (1827) 3, 12

Pennsylvania v. Union Gas Co.,
491 U.S. 1 (1988) 5

People v. Herkimer,
4 Cowen 348 (N.Y. Sup. 1825) 14

Principality of Monaco v. Mississippi,
292 U.S. 313 (1934) 10

Sacred Heart Hosp. of Norristown v. Pa.
(*In re Sacred Heart Hosp. of Norristown*),
133 F.3d 237 (3d Cir. 1998) 4

Schlossberg v. Maryland
(*In re Creative Goldsmiths of Wash., D.C., Inc.*),
119 F.3d 1140 (4th Cir. 1997) 4

Sturgis v. Crowninshield,
17 U.S. (4 Wheat.) 122 (1819) 3, 12

Seminole Tribe v. Florida,
517 U.S. 44 (1996) ..... *passim*

Tennessee Student Assistance Corp. v. Hood,
541 U.S. 440 (2004) ..... *passim*

United States v. Herron,
87 U.S. 251, 255 (1873) 14

United States v. Nordic Village,
503 U.S. 30 (1992) 4, 17, 18, 19

United States v. Shaw,
309 U.S. 495 (1940) 19

Statutes

11 U.S.C. § 106 5

Other Authorities

Annals of Congress (1794) 11

Cordry, *Seminole Seven Years On*,
2003 Annual Survey of Bankruptcy Law,
William L. Norton, Jr., Ed. (Thompson-West) 12

Duncan, *From Dismemberment to Discharge:*
The Origins of Modern American Bankruptcy Law,
100 Commercial L. J. No. 2, (1995) 12

Elliot, *Debates on the Federal Constitution*
(2d Ed. 1854) 8

Hamilton, *Federalist Papers* 32 ..... 5, 9

Hamilton, *Federalist Papers* 81 ..... 5, 9

Friedman, *A History of American Law*,
238-40 (1973) 12

Hotchkiss, *Bankruptcy Laws, Past and Present*,
The North American Review,
Vol. 167, Issue 504, November 1898 15

King, *Collier on Bankruptcy*
(15th ed. 1979), Vol. A, Pt. 3 15

Tabb, *The Historical Evolution of the Bankruptcy Discharge*,
65 Am. Bankr. L.J. 325, 346-47 (1991) 14

Tabb, *The History of the Bankruptcy Laws*
in the United States,
3 Am. Bankr. Inst. L. Rev. 5, Spring (1995) 15

Warren, *The Supreme Court in United States History*
96 (rev. ed. 1926) 10

STATEMENT OF *AMICI* INTEREST

Amici State of Ohio and 48 other States and Commonwealths ("*amici* States") have a vital interest in this case, as it implicates one of the most controversial and publicly-debated legal issues of recent years—the power of Congress to abrogate the States' Eleventh Amendment immunity. The issue is squarely presented here in a context not yet directly addressed by the Court, but vital to a State's ability to control its fisc: bankruptcy.

The States are frequently brought into contact with the bankruptcy system, both as creditors, and as parties that, as here, lawfully received payments from the debtor prior to the petition and find themselves subject to suit to recover the payments. In the first quarter of fiscal year 2005 alone, over 400,000 bankruptcy cases were filed. In many of these, one or more States may have received some payment that could be attacked as a preference. And in each such case, a State may find itself haled into adversary litigation by a private litigant seeking to recover money, in a court hundreds or thousands of miles away. Under the Sixth Circuit's view, a debtor may institute a suit against a State and force the State to defend its rights at a time and place solely of the debtor's choosing.

Bankruptcy suits are particularly onerous for States because they are unpredictable, can occur anywhere in the country, and can involve large sums of money. Preference suits in particular are often filed in a blunderbuss fashion, with little or no investigation whether the transactions were outside the ordinary course of business or are otherwise defensible. In some cases, the amounts sought are tiny in comparison to the cost of defending the action. The State governments, unlike the federal government and other large creditors, do not have offices and counsel in every jurisdiction. The procedural difficulties and costs inherent in being forced into litigation in a distant forum can greatly burden the public treasury.

The *amici* States therefore urge the Court to overrule the court below and hold that the Eleventh Amendment bars preference suits and actions on prepetition contracts filed in bankruptcy against unconsenting States.

SUMMARY OF ARGUMENT

In case after case, the Court has affirmed that Congress cannot use *any* of its Article I powers to override the States' Eleventh Amendment immunity. The early history of the Constitution and of bankruptcy law confirms that there is no reason to create an exception to this rule for Congress's Article I bankruptcy powers. History unequivocally demonstrates that the Founders understood that although the States ceded some sovereign law-making *power* over bankruptcy, the States retained their full sovereign *immunity*. The historical evidence indicates no pattern of forcing States to submit to suits by private parties in bankruptcy. Indeed, the Founders' writings and speeches, the debates of the ratifying conventions, public reaction to early case law and the history of bankruptcy and insolvency law all confirm that there was no intent by the Founders to involuntarily subject States to suits in bankruptcy and there is no reason for this Court to do so now.

Moreover, while the States may have ceded some of their sovereign power to legislate, this Court confirmed in *Seminole Tribe of Florida v. Florida* that the extent of the law-making power ceded to Congress in the Constitution is irrelevant to the States' sovereign immunity. 517 U.S. 44, 72 (1996). And even if the extent of States' sovereign immunity in a particular area of law were somehow linked to the extent of sovereign power ceded in the plan of the Convention, the States ceded less power in bankruptcy than in other Article I areas.

For instance, the Court has held that Congress's power under the Commerce Clause is so broad that it preempts States from even legislating within its sphere—the so-called "dormant commerce clause" doctrine. In the bankruptcy context, by contrast, States are allowed to pass—and have passed—insolvency and bankruptcy laws in the absence of federal bankruptcy coverage. *Sturgis v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819); *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827). Thus, the Court's established precedent, which rejects abrogation in the Commerce Clause context, forecloses it here.

In addition, the history of bankruptcy legislation and the surrounding commentary contain no mention of the States having ceded sovereign immunity in bankruptcy. After a contentious early history, the first permanent bankruptcy law was passed in 1898—only a few years after *Hans v. Louisiana*, 134 U.S. 1 (1890) definitively held that the States retained sovereign immunity. No mention is made in either the 1898 statute or surrounding commentary that bankruptcy was an exception to *Hans*. Indeed, Congress attempted to abrogate the States' immunity for the first time only in 1978—hardly evidence of an understanding "in the plan of the convention." In short, twentieth-century amendments to bankruptcy statutes cannot serve to change a clear constitutional understanding about structural limits on congressional power.

Finally, Katz cannot rely on the federal court's *in rem* jurisdiction, as the petitioner did in *Tennessee Student Assistance Corporation v. Hood*, 541 U.S. 440 (2004) (*Hood II*), as a means of avoiding the Eleventh Amendment problems his claims face. Unlike the discharge order at issue in *Hood II*, this case involves the liquidating supervisor seeking to recover money paid to the State on preference and

contract grounds. The Court implied in *Hood II* that "an adversary proceeding by the bankruptcy trustee seeking to recover property in the hands of the State on the grounds that the transfer was a voidable preference" is outside the bankruptcy court's *in rem* jurisdiction. 541 U.S. at 454. The Court held as much in *Hoffman v. Connecticut Dept. of Income Maintenance*, 492 U.S. 96 (1989) and *United States v. Nordic Village Inc.*, 503 U.S. 30 (1992). Thus, such claims remain subject to the Eleventh Amendment's limitations on federal court jurisdiction and, under those limitations, Katz cannot proceed on his claim here.

ARGUMENT

This case permits the Court to reach and resolve the abrogation issue it left open in *Hood II*. The Sixth Circuit in *Hood v. Tennessee Student Assistance Corp.* (*In re Hood*), 319 F.3d 755 (6th Cir 2003) (*Hood I*) held that the States lacked any sovereign immunity in the bankruptcy context—a radical departure from the other circuits to have considered the issue.[1] The Court granted certiorari to resolve that issue, but ultimately determined that *Hood II* involved an *in rem* proceeding in which the Eleventh Amendment did not apply. 541 U.S. at 451-455.

Because the Court did not reach the abrogation issue in resolving *Hood II*, *Hood I* remains binding precedent in

[1] *Georgia Higher Education Assistance Corp. v. Crow (In re Crow)*, 2004 U.S. App. Lexis 26872; *Nelson v. Lacrosse Co. Dist. Atty. (In re Nelson)*, 301 F.3d 820 (7th Cir. 2002); *Mitchell v. Franchise Tax Bd. (In re Mitchell)*, 209 F.3d 1111, 1120 (9th Cir. 2000); *Sacred Heart Hosp. of Norristown v. Pa. (In re Sacred Heart Hosp. of Norristown)*, 133 F.3d 237, 245 (3d Cir. 1998); *Dept. of Transp. & Dev. v. PNL Asset Mgmt. Co. LLC (In re Fernandez)*, 123 F.3d 241, 246 (5th Cir. 1997); *Schlossberg v. Md. (In re Creative Goldsmiths of Wash., D.C., Inc.)*, 119 F.3d 1140, 1147 (4th Cir. 1997).

the Sixth Circuit, and was applied in the case below. *Hood I* held that the States ceded their sovereign immunity in bankruptcy court, as well as their sovereign authority over the area of bankruptcy, in the plan of the Constitutional Convention. The *Hood I* Court thus concluded that Congress had the power to abrogate—and did abrogate—the States' immunity in enacting 11 U.S.C. § 106(a).

Thus, despite overwhelming precedent to the contrary, the *Hood I* court adopted an obsolete and discredited theory of sovereign immunity. Under the Sixth Circuit's rationale, the States, in giving up their sovereign *power* to legislate in the area of bankruptcy, also ceded their sovereign *immunity* from suit in federal bankruptcy court. This idea is nothing new—it was the rationale behind the now-defunct plurality opinion in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1988), holding that Congress could abrogate the States' sovereign immunity under the Commerce Clause. It was also the basis for the dissent in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 277-78 (1985), which found support in precisely the same conjunction of *Federalist Papers* 81 and 32 that the *Hood I* court relied on. However, that argument was expressly overruled in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

In fact, in case after case, the Court has affirmed that Congress cannot use *any* of its Article I powers to override the States' Eleventh Amendment immunity. The *Seminole Tribe* opinion in particular makes two points central to the *amici* States' position here. First, the extent of law-making power ceded to the federal government is irrelevant to the retention of sovereign immunity by the States. "Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States." *Seminole Tribe*, 517

U.S. at 72-73; see also, *Id.* at 73, n.16. ("it has not been widely thought that the federal antitrust, bankruptcy, or copyright statutes abrogated the States' sovereign immunity.")

Second, the *Seminole Tribe* Court held that Article I did not give Congress the power to overcome sovereign immunity. "The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." *Id.*[2]

In numerous cases since *Seminole Tribe* the Court has reiterated those principles with regard to other Article I clauses and laws passed under their authority. *Florida Prepaid Postsecondary Education Expense Bd. v. College Savings Bank*, 527 U.S. 627, 636 (1999) (Patent Clause); *Alden v. Maine*, 527 U.S. 706 (1999) (Fair Labor Standards Act); *Bd. of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 364 (2001) (Americans with Disabilities Act). *See also City of Boerne v. Flores*, 521 U.S. 507 (1997); *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997); *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Bd.*, 527 U.S. 666 (1999); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 79 (2000).

As demonstrated below, the historical background of the Bankruptcy Clause and early American bankruptcy law, as well as the history of the Eleventh Amendment, make clear that the *Union Gas* rationale has no more viability

---

[2] Similarly, the fact that bankruptcy courts are authorized under Article I rather than Article III gives Congress no power to overcome the States' sovereign immunity. Congress cannot circumvent the limitations placed on Article III courts by creating Article I courts. *See Federal Maritime Commission v. South Carolina Ports Authority*, 535 U.S. 743, 756-767 (2002).

under the Bankruptcy Clause than it does under the Interstate Commerce, Indian Commerce or Patent clauses.

And, as also demonstrated below, the Court's precedent holds that a bankruptcy court's *in rem* jurisdiction does not extend to an adversary action seeking to recover property in the hands of a State. Such actions fall under the traditional Eleventh Amendment prohibition against federal court judgments that must be paid out of a State's treasury.

A. The early history of the Constitution illustrates that the founders distinguished the sovereign power of the States from the sovereign immunity of the states in the context of bankruptcy.

In addition to the overwhelming precedent holding that the States retained sovereign immunity from suit at the same time they alienated sovereign power to pass laws in those areas of law enumerated in Article I, the early history of the Constitution and of bankruptcy law illustrates the founders' understanding that the States retained sovereign *immunity* in bankruptcy, while having ceded at least some sovereign law-making *power* in that area.

A comprehensive picture of the founders' intent and understanding of State sovereign immunity at the time of the debates and ratification of the Constitution has been well documented. *Alden v. Maine*, 527 U.S. at 716-724. That history will not be repeated in detail, except to make the following points.

1. The general understanding at the time of the founders was that States would continue to enjoy sovereign *immunity* from suit in all areas of law, despite having alienated their sovereign *power* in some areas. *Alden*, 527 U.S. at 716-724. Advocates repeatedly assured the people "in no uncertain

terms that the Constitution would not strip the States of sovereign immunity." 527 U.S. at 716.

Both James Madison and John Marshall spoke at the Virginia ratifying convention, supporting the understanding that a State would not be sued without its consent. *Alden*, 527 U.S. at 717-18; 3 Elliot, *Debates on the Federal Constitution* 533, 555 (2d Ed. 1854). The New York and Rhode Island conventions expressly proclaimed that the Constitution did not allow private persons to sue the States. 527 U.S. at 718-19; 1 *Debates* at 336, 329.

Nor, as suggested in *Hood I*, 319 F.3d at 767, is it remarkable that bankruptcy was not specifically mentioned in the ratification debates. Indeed, there was no debate in the ratification conventions about the States' sovereign immunity under the Patent Clause, the Indian Commerce Clause or any other specific part of Article I. With the exception of general areas of law, such as "chancery, admiralty and common law," 3 *Debates* at 533, 555, the debaters spoke in generalities about civil lawsuits and state sovereignty. The statements of Patrick Henry and Edmund Pendleton, cited by the *Hood I* court, are not to the contrary. 3 *Debates*, 539-546 (statement of Patrick Henry); 3 *Debates* 549 (statement of Edmund Pendleton).

As the Court has noted, "[I]n exercising its Article I powers, Congress may subject the States to private suits . . . only if there is 'compelling evidence' that the States were required to surrender this power to Congress pursuant to the constitutional design." *Alden*, 527 U.S. at 730, *citing Blatchford v. Native Village of Noatak*, 501 U.S. 775, 781 (1991). The absence of a discussion on bankruptcy does not constitute the sort of "compelling evidence" necessary to show that the States surrendered immunity in the constitutional design.

2. The Sixth Circuit's reliance in *Hood I* on a conjunction of the *Federalist Papers* Nos. 81 and 32 is equally misguided. In the *Federalist Papers*, Alexander Hamilton was careful to distinguish "an alienation of State sovereignty"—by which he meant legislative authority, and which he had discussed extensively in the *Federalist* No. 32—from State sovereign immunity from suit, which he discussed in *Federalist* No. 81. Contrary to the assertions of the Sixth Circuit in *Hood I* (and of the dissent in *Atascadero*), Hamilton's reference to an alienation of state sovereignty in *Federalist* No. 32 was not intended to include an alienation of sovereign immunity in some areas of law.

A close reading of *Federalist* No. 81 indicates that Hamilton was carefully separating the two concepts. He first introduced the subject of sovereign immunity: "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." He went on to state that "[u]nless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States . . . ." *Federalist* No. 81. In other words, if the Constitution does not take away sovereign immunity, it remains with the States.

Hamilton then pointed out that the subject of States alienating sovereign *power*—that is, the ability to pass laws on a particular subject—had been discussed in *Federalist* No. 32: "The circumstances which are necessary to produce an alienation of State sovereignty were discussed in considering the article of taxation, and need not be repeated here." He went on to conclude that despite this alienation of sovereign *power*, the States' sovereign *immunity* remained: "A recurrence to the principles there established [*i.e.*, principles established in *Federalist* 32's discussion of sovereign power] will satisfy us, that there is no color to pretend that the State

governments would, by the adoption of that plan [*i.e.*, the adoption of a plan that alienates state law-making power over some areas of law], be divested of the privilege of paying their own debts in their own way . . .." *Federalist* No. 81.

In *Federalist* No. 81, Hamilton sought to quell the fear that sovereign immunity *in any context* would be given up if the Constitution were ratified, and so distinguished the States' alienation of limited law-making *power* to Congress—discussed in *Federalist* No. 32—from the States' retention of sovereign *immunity* to suit in federal courts—discussed in *Federalist* No. 81. If he were not distinguishing the two concepts, his concluding statement would either be a logical *non sequitur*, or highly misleading. The Court has long assumed that Hamilton meant what he said—ceding legislative *power* has no effect on sovereign *immunity*.

3. Public reaction to early case law also illustrates that the founding generation understood the distinction between the alienation of sovereign power in certain areas—which it accepted—and a surrender of sovereign immunity—which it did not. To repeat the oft-told tale, when, just five years after the Constitution was ratified, the Supreme Court held in *Chisholm v. Georgia*, 2 U.S. (Dall.) 419 (1793), that a private citizen of another State could sue the State of Georgia, the decision "fell upon the country with a profound shock." *Alden*, 527 U.S. at 720, quoting 1 Warren, *The Supreme Court in United States History* 96 (rev. ed. 1926); *accord*, *Hans v. Louisiana*, 134 U.S. 1, 11 (1890); *Principality of Monaco v. Mississippi*, 292 U.S. 313, 325 (1934); *Seminole Tribe*, 517 U.S. at 69. The press responded with outrage. *Alden*, 527 U.S. at 720. It took Congress just one day to introduce a proposal to amend the Constitution to reverse *Chisholm*'s result. 527 U.S. at 721, citing 4 *Annals of Congress* 25, 30, 477, 499 (1794). The Eleventh Amendment was eventually passed with only one day's debate in each

house of Congress. *Alden*, 527 U.S. at 721, citing 4 *Annals* at 30-31, 476-78.

Yet, while there was no doubt a lively debate about the topic at the time, the early cases delineating supreme federal law-making *power* (as opposed to the States' sovereign *immunity*) did not result in the constitutional crisis precipitated by *Chisholm*. For instance, in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), the Court struck down a Maryland tax law as being in conflict with federal power. In *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), the Court struck a New York law as being in conflict with the federal commerce power. Neither of these decisions engendered the controversy surrounding *Chisholm*.

Thus, only a few years after *Chisholm* and the final ratification of the Eleventh Amendment, the Court issued ground-breaking opinions establishing the supremacy of federal law. Yet *McCulloch* and *Ogden* did not "[fall] upon the country with a profound shock" as did *Chisholm*. No alacritous move to amend the Constitution followed these early decisions. The States accepted the loss of law-making power to the federal government in the limited areas spelled out by the Constitution, while they most emphatically had not accepted a loss of sovereign immunity in any area enumerated in Article I.

B. The early history of bankruptcy, together with modern case law, illustrate that the States retain sovereign immunity regardless of the extent of the power ceded to Congress.

As explained above, *Seminole Tribe* expressly held that the extent of the law-making power ceded to Congress in the Constitution is irrelevant to the States' sovereign immunity. 517 U.S. at 72. But even if the extent of States'

sovereign immunity in a particular area of law were somehow linked to the extent of sovereign power ceded in the plan of the Convention—which the *amici* States do not concede—the States arguably ceded *less* power in the area of bankruptcy than in other Article I areas such as commerce.

During lengthy periods of the country's early history, no federal bankruptcy law was in effect. Duncan, *From Dismemberment to Discharge: The Origins of Modern American Bankruptcy Law*, 100 Commercial L. J. No. 2, 191, 218-19 (1995) ("Duncan"); Friedman, *A History of American Law*, 238-40 (1973); Cordry, *Seminole Seven Years On*, in 2003 Annual Survey of Bankruptcy Law, William L. Norton, Jr., Ed. (Thompson-West) pp. 401-409 ("Cordry"). State bankruptcy and insolvency laws were effective during these periods, despite some initial controversy as to whether they were preempted by the Bankruptcy Clause. Friedman at 274; Duncan at 216, 219-220.

In *Sturgis v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819), and later in *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827) the Court held that there was no dormant bankruptcy power, and in the absence of superseding national bankruptcy laws, state bankruptcy and insolvency laws were valid, if they did not violate the Contracts Clause. 17 U.S. (4 Wheat) at 196; 25 U.S. (12 Wheat.) at 268. *See also Geery's Appeal*, 43 Conn. 289 (1876); *Griswold v. Pratt*, 50 Mass. 16 (1845); *John McConologue's Case*, 107 Mass. 154 (1871).

In contrast, the Interstate Commerce Clause carries with it a "dormant" power—that is, States are precluded from passing laws in the area, even if Congress has not done so. *See Camps Newfound/Owatonah v. Town of Harrison*, 520 U.S. 564, 571-72 (1997), and cases cited therein. Yet, the Court has held that the States did not alienate their sovereign immunity in the context of the Commerce Clause. *College*

Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999).

Indeed, the *Seminole Tribe* Court held that the States have even less power over Indian commerce than they do over interstate commerce, yet the States have sovereign immunity in the area of Indian commerce: "[T]he background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government." 517 U.S. at 62, 72. In other words, the extent of the power ceded to Congress is irrelevant—the States enjoy sovereign immunity from suit in federal court regardless of the particular Article I power exercised by Congress. If the extraordinarily broad powers under the Commerce Clause and the Indian Commerce Clause do not suffice to give Congress the power to abrogate, surely the more limited Bankruptcy Clause also does not give Congress that power.

Therefore, the early history of the Constitution and of bankruptcy laws, together with more recent case law, demonstrates that Congress's power to abrogate immunity in bankruptcy court is no more potent than it is with regard to any other Article I power.

C. The early history of bankruptcy reveals no established practice of subjecting States to suit in bankruptcy.

In *Hans v. Louisiana*, 134 U.S. 1 (1890), the Supreme Court held that the Constitution was not intended to create unusual or unheard of suits that did not exist at the time of the ratification. There was "a presumption that no anomalous and unheard-of proceedings or suits were intended to be

raised up by the Constitution—anomalous and unheard of when the Constitution was adopted." 134 U.S. at 18; see also *Blatchford*, 501 U.S. at 781. In other words, absent an established pattern of allowing suits against the States at or near the time of the ratification, the States are presumed to retain their sovereign immunity. The history of bankruptcy reveals no such established pattern.

The founding generation left no indication that States were to be sued in bankruptcy. Longstanding principles of English statutory interpretation dictated that no statute was presumed to cover the Crown unless clear reference of such an intention was made, and therefore the Crown was exempt from suit under the laws. *United States v. Herron*, 87 U.S. 251, 255 (1873). The first bankruptcy law, passed in 1800, specifically precluded the impairment of debts owed to the United States or to a State. Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 Am. Bankr. L.J. 325, 346-47 (1991) ("Tabb, 1991"). Although later bankruptcy laws did not include such language, the Court held that these laws did not discharge debts to the United States and noted with approval a similar application to the States by state courts. *Herron*, 87 U.S. 251, 260-62 (1873), citing *People v. Herkimer*, 4 Cowen 348 (N.Y. Sup. 1825), and *Commonwealth v. Hutchinson*, 10 Pa. 466 (1849); see also *Connecticut v. Shelton*, 47 Conn. 400 (1879).

By the time Congress enacted the first bankruptcy law—thirteen years after the ratification of the Constitution, *Chisholm* had already "[fallen] upon the country with a profound shock," and the Eleventh Amendment had already been proposed, passed and ratified. Tabb, *The History of the Bankruptcy Laws in the United States*, 3 Am. Bankr. Inst. L. Rev. 5, Spring 1995, p. 9 ("Tabb, 1995"). Nothing in that early enactment contradicts the presumption that the founders

intended the Eleventh Amendment to apply to bankruptcy as much as to any other Article I power.

Later history is not to the contrary. As explained above, after almost a century with no long-lasting legislation, Congress finally passed the first comprehensive and permanent federal bankruptcy law in 1898. *See* King, *Collier on Bankruptcy* (15th Ed. 1979), Vol. A, Pt. 3. Only eight years before, the Court had issued *Hans*—which firmly and finally established the States' sovereign immunity from suit in federal court. Despite the currency of *Hans*, no provision of the 1898 bankruptcy act hints that the *Hans* doctrine should be ignored in the area of bankruptcy. And contemporary commentators make no mention of State sovereign immunity in the 1898 bankruptcy act, despite criticism -of many aspects of the new law. *See, e.g.*, Hotchkiss, *Bankruptcy Laws, Past and Present*, The North American Review, Vol. 167, Issue 504, November 1898, pp. 580-591.

In fact, it was almost two hundred years after the Constitution was ratified, in 1978, before Congress attempted to abrogate the States' sovereign immunity in bankruptcy court. Thus, there is no evidence of any understanding at the time that the States were giving up sovereign immunity in the area of bankruptcy "in the plan of the convention."

Therefore, the plan of the convention and the early histories of Eleventh Amendment jurisprudence and bankruptcy law establish no tradition of private suits against the States. To the contrary, history shows an understanding that the States "retain the dignity" of sovereign immunity "though not the full authority" of independent sovereigns with regard to *all* Article I powers—including bankruptcy. *Alden*, 527 U.S. at 715.

D. A bankruptcy court's *in rem* jurisdiction does not extend to "an adversary proceeding by the bankruptcy trustee seeking to recover property in the hands of the State on the grounds that the transfer was a voidable preference."

Unlike the situation in *Hood II*, the claims here do not fall within the bankruptcy court's *in rem* jurisdiction. Therefore, regardless of the extent to which *in rem* jurisdiction may have different treatment under the Eleventh Amendment, the claims here remain subject to its constraints. The action here does not merely seek to subject the State to an order granting the debtor a global discharge of all her debts as in *Hood II*, but rather seeks recovery of funds on preference and contract theories directly from the State. Not only do the principles of *in rem* jurisdiction not apply to this case, but the Court has acknowledged in previous cases, including *Hood II*, that in a preference action against a State, Eleventh Amendment immunity bars relief.

The *Hood II* Court described two hallmarks of *in rem* jurisdiction as it pertains to discharge. First, the court's power was premised on its control over the debtor's property, and not its control over the creditors. 541 U.S. at 446-48.

A second hallmark of *in rem* jurisdiction described in *Hood II* is that the action is one settling the ownership of the *res*, not just between the parties to the action, but "against the world." In the case of bankruptcy discharge, a bankruptcy court's *in rem* jurisdiction "permits it to 'determine all claims that anyone, whether named in the action or not, has to the property or thing in question. The proceeding is "one against the world."'" *Hood II*, 541 U.S. at 448, quoting 16 J. Moore, et al., Moore's Federal Practice § 108.70[1], p. 108-106 (3d ed. 2004). Such jurisdiction allows the court to make a global determination of the debtor's status as a discharged

bankrupt. 541 U.S. at 453. See also *Hanover Nat. Bank v. Moyses*, 186 U.S. 181, 192 (1902).

In this case, unlike in *Hood II*, neither hallmark of *in rem* jurisdiction applies. This case arises not from a discharge action to determine the debtor's status, but from an action filed against the Commonwealth of Virginia to recover money asserted to be a voidable preference. The federal court is seeking the return of property unequivocally in the possession of the Commonwealth of Virginia and to which the Commonwealth of Virginia undoubtedly owns title. Any judgment the court might issue would determine a claim against only the Commonwealth, and not "against the world." And unlike in *Hood II*, the liquidator does seek affirmative relief from a State, and is subjecting an unwilling State to a coercive judicial process. See 541 U.S. at 450.

In at least two cases, this Court has held that actions such as this one, in which a trustee or liquidator files an adversary proceeding seeking to recover a transfer from a government, sovereign immunity applies to bar the action. In *United States v. Nordic Village*, 503 U.S. 30 (1992) the Court held that an adversary action against the federal government to return a transfer made to the IRS in payment of a tax debt was barred by sovereign immunity. The *Nordic Village* Court first rejected the argument that such an action is an exercise of *in rem* jurisdiction, noting that "Respondent sought to recover a sum of money, not 'particular dollars,' so there was no *res* to which the court's *in rem* jurisdiction could have attached." *Id.* It then further dismissed the argument that *in rem* jurisdiction, even if applied, could override sovereign immunity in an action to recover a monetary transfer. *Id.* at 38.

And directly on point here is *Hoffman v. Connecticut Dept. of Income Maintenance*, 492 U.S. 96 (1989). In

Hoffman, the Court found that an adversary action against the State of Connecticut to recover Medicaid and tax payments as preferences was barred by Eleventh Amendment immunity. 492 U.S. at 102. "[A] State that files no proof of claim would be bound, like other creditors, by discharge of debts in bankruptcy, . . . but would not be subjected to monetary recovery." *Id.* The *Hoffman* Court found that Congress had failed to abrogate immunity under then-section 106(c). 492 U.S. at 104.

Finally, the Court in *Hood II* took care to distinguish an *in rem* action in discharge from "an adversary proceeding by the bankruptcy trustee seeking to recover property in the hands of the State on the grounds that the transfer was a voidable preference."—the exact situation faced by the Court here. 541 U.S. at 454. In short, the Court's precedents already hold that this case is an action *in personam*, and not *in rem*.

Alternatively, even if preference claims are treated as arising under *in rem* jurisdiction, they are a type of *in rem* claim that remains subject to the Eleventh Amendment. An action that seeks to affect the right of a State in its ownership of an asset—even if characterized as *in rem*—is not allowed under the Eleventh Amendment. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281-82, 291, 307 (1997) (quiet title action brought against a State is barred by the Eleventh Amendment).

And the *Hood II* Court implied that the same principle applies to claims arising under *in rem* jurisdiction in bankruptcy cases. 541 U.S. at 448. See also *Nordic Village*, 503 U.S. at 38, citing *United States v. Shaw*, 309 U.S. 495 (1940): "[W]e have never applied an *in rem* exception to the sovereign-immunity bar against monetary recovery, and have suggested that no such exception exists." *Id.*

Here, there is no question that the State has lawful possession of the funds. Thus, to the extent these claims seek return of money lawfully paid to the State, they are fully subject to the Eleventh Amendment, whether the court's jurisdiction is *in rem* or *in personam*.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

JIM PETRO
Attorney General of Ohio
DOUGLAS R. COLE
State Solicitor
ELISE W. PORTER*
Assistant Solicitor
**Counsel of Record*
30 East Broad Street, 17th Floor
Columbus, Ohio 43215-3428
614-466-8980
614-466-5087 fax

Counsel for *Amici* States

June 17, 2005

No. 04-885

Supreme Court, U.S.
FILED
AUG 22 2005
CLERK

In The Supreme Court of the United States

CENTRAL VIRGINIA COMMUNITY COLLEGE, VIRGINIA MILITARY INSTITUTE, NEW RIVER COMMUNITY COLLEGE and BLUE RIDGE COMMUNITY COLLEGE,

Petitioners,

v.

BERNARD KATZ, Liquidating Supervisor of the Bankruptcy Estate in *In re Wallace's Bookstores, Inc.*,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN SUPPORT OF RESPONDENT FOR *AMICI CURIAE* PROFESSORS SUSAN BLOCK-LIEB, ERWIN CHEMERINSKY, MARGARET HOWARD, KENNETH N. KLEE, JONATHAN C. LIPSON, RALPH R. MABEY, JEFFREY W. MORRIS, LAWRENCE PONOROFF AND ELIZABETH WARREN

SUSAN M. FREEMAN
Counsel of Record
LEWIS AND ROCA LLP
40 North Central Avenue
Phoenix, AZ 85004-4429
602-262-5756

RICHARD LIEB
KRONISH LIEB WEINER & HELLMAN, LLP
1114 Avenue of the Americas
New York, NY 10036-7798
212-479-6020

Counsel for Amici Curiae

August 22, 2005

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. Bankruptcy Laws Apply and Are Enforced Differently From Other Article I Laws, Requiring a Different Analysis of Sovereign Immunity	3
II. The Bankruptcy Court Has *In Rem* Jurisdiction Over Preferential Transfers	6
A. Resolution of Preferences Is Integral to Collection and Distribution of the *Res*	6
B. Bankruptcy Courts Should Be Able to Require Recovery of Avoided Transfers Without State Consent	8
III. State Sovereign Immunity Is Inapplicable to a Federally-Created Bankruptcy Estate Implementing Bankruptcy Code Provisions	12
A. The Eleventh Amendment Does Not Preclude Suits Against States by the United States and Federally-Created Entities	12
B. Bankruptcy Estates May Assert Preference Claims Against States	13
IV. The American People Allocated Bankruptcy Jurisdiction to the Federal Government to Bind State Authorities	16

TABLE OF CONTENTS – Continued

Page

A. The Bankruptcy Clause Was Intended to Encompass Immunity From Suit 18

B. Bankruptcy Uniformity Is Not Merely Geographical, but it Restricts Sovereign Immunity as Well 23

C. Bankruptcy Laws in Their Entirety Were Intended to Be Enforceable Against States 26

CONCLUSION 29

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Alden v. Maine, 527 U.S. 706 (1999) 5, 9, 17

Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985) 3

In re Barman, 252 B.R. 403 (Bankr. E.D. Mich. 2000) 15

Begier v. Internal Revenue Service, 496 U.S. 53 (1990) 7, 9

Blanchette v. Connecticut Gen. Ins. Corps., 419 U.S. 102 (1974) 24

Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991) 17

Board of Trustees v. Garrett, 531 U.S. 356 (2001) 5

In re Castillo, 297 F.3d 940 (9th Cir. 2002) 15

Ex parte Christy, 44 U.S. 292 (1845) 8, 13

City of New York v. New York, N.H. & H.R. Co., 344 U.S. 293 (1953) 8

Claflin v. Houseman, 93 U.S. 130 (1986) 13

Gardner v. New Jersey, 329 U.S. 565 (1947) 7, 8, 9, 29, 30

Governor of Georgia v. Madrazo, 26 U.S. 110 (1828) 27

Grandfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989) 26

Hanover Nat'l Bank v. Moyses, 186 U.S. 181 (1902) ... 15, 24

TABLE OF AUTHORITIES – Continued

Page

Hans v. Louisiana, 134 U.S. 1 (1890) 17

Hansen, Jones & Leta, P.C. v. Segal, 220 B.R. 434 (D. Utah 1998) 14

Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1 (2000) 16

Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30 (1994) 18

Hood v. Tennessee Student Assistance Corp. (In re Hood), 319 F.3d 755 (6th Cir. 2003) 1, 6

Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997) 5, 9

Katchen v. Landy, 382 U.S. 323 (1966) 7, 11, 14

Matter of Linton, 136 F.3d 544 (7th Cir. 1998) 15

Marbury v. Madison, 1 Cranch 137 (1803) 5

Marsh v. Chambers, 463 U.S. 783 (1983) 28

McConnell v. Adams, 829 F.2d 1319 (4th Cir. 1987), *cert. denied*, 486 U.S. 1006 (1988) 10

McCulloch v. Maryland, 17 U.S. 316 (1819) 25

National Labor Relations Board v. Bildisco & Bildisco, 465 U.S. 513 (1984) 14

Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) 15

Ogden v. Saunders, 25 U.S. (12 Wheat) 213 (1827) 20

Osborn v. Bank of U.S., 22 U.S. 738 (1824) 12, 13

Ossen v. Department of Social Servs. (In re Charter Oak Assocs.), 361 F.3d 760 (2d Cir.), *cert. denied*, 125 S. Ct. 408 (2004) 7

TABLE OF AUTHORITIES – Continued

Page

Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984) 27

Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989) 3

Perez v. Campbell, 402 U.S. 637 (1971) 26, 29

Printz v. United States, 521 U.S. 898 (1997) 9

Railway Labor Executives' Ass'n v. Gibbons, 455 U.S. 457 (1982) 5, 20, 24

Schoenthal v. Irving Trust Co., 287 U.S. 92 (1932) 26, 30

Seminole Tribe v. Florida, 517 U.S. 44 (1996) 3, 17, 25

Smith v. Reeves, 178 U.S. 436 (1900) 13

Sturges v. Crowninshield, 17 U.S. (4 Wheat) 122 (1819) 20, 24

Tennessee Student Assistance Corp. v. Hood, 541 U.S. 440 (2004) ..... *passim*

United States v. Mississippi, 380 U.S. 128 (1965) 12

Vanston Bondholders Protective Comm. v. Green, 329 U.S. 156 (1946) 24, 29

Williams v. Austrian, 331 U.S. 642 (1947) 15

Ex parte Young, 209 U.S. 123 (1908) 27

STATE CASES

Commonwealth v. Luzik, 259 Va. 198, 524 S.E.2d 871 (2000) 10

TABLE OF AUTHORITIES – Continued

Page

RULES, REGULATIONS AND STATUTES

Bankruptcy Rules:

Rule 3002 8
Rule 3003 8
Rule 3004 8

United States Code:

11 U.S.C. § 323 14
11 U.S.C. § 324(a) 14
11 U.S.C. § 326(a) 14
11 U.S.C. § 327(a) 14
11 U.S.C. § 501(c) 8
11 U.S.C. § 502(a) 8, 16
11 U.S.C. § 502(d) 7
11 U.S.C. § 521(1) 7
11 U.S.C. § 541(a)(1) 6
11 U.S.C. § 541(a)(3) 7
11 U.S.C. § 542 15
11 U.S.C. § 547 ..... 6, 7, 15
11 U.S.C. § 547(b) 16
11 U.S.C. § 547(b)(5) 13
11 U.S.C. § 550 ..... 7, 11
11 U.S.C. § 551 8
11 U.S.C. § 701 14
11 U.S.C. § 704(5) 8

TABLE OF AUTHORITIES – Continued

Page

11 U.S.C. § 925 8
11 U.S.C. § 1104 14
11 U.S.C. § 1106(a)(1) 8
11 U.S.C. § 1107 14
11 U.S.C. § 1111(a) 8
11 U.S.C. § 1123(b)(3)(B) 14
11 U.S.C. § 1302(b)(1) 8
28 U.S.C. § 157(a) 7
28 U.S.C. §§ 157(b)(2)(B) 16
28 U.S.C. §§ 157(b)(2)(C) 16
28 U.S.C. § 157(b)(2)(F) 16
28 U.S.C. § 582 14
28 U.S.C. § 586 16
28 U.S.C. § 586(a)(1) 14
28 U.S.C. § 586(a)(3) 14
28 U.S.C. § 586(c) 14
28 U.S.C. § 586(d) 14
28 U.S.C. § 1334 14
28 U.S.C. § 1334(e) 7

Virginia Code Annotated:

§ 2.2-815.A 10

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Bankruptcy Act of 1800, Sess. I, Ch. 19, §§ 34, 38 ..... 19, 27

Ralph Brubaker, *On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory*, 41 WM. & MARY L. REV. 743 (2000) 14

Hon. Randolph J. Haines, *The Uniformity Power: Why Bankruptcy Is Different*, 77 AM. BANKR. L.J. 129 (2003) 17, 24, 25, 27, 28

THE FEDERALIST, The Modern Library's 2000 edition, edited by Robert Scigliano:

No. 32 ..... 3, 17, 18, 25

No. 42 ..... 25, 26

No. 81 ..... 3, 25

THE FEDERALIST NO. 80 (C. Rossiter ed. 1961) 6

Jonathan C. Lipson, *Fighting Fiction with Fiction – The New Federalism in (a Tobacco Company) Bankruptcy*, 78 WASH. U.L.Q. 1271 (2000) 11, 24

Bruce H. Mann, *Republic of Debtors: Bankruptcy in the Age of American Independence* 79 (Harvard U. Press 2002) 19, 20, 21, 22

Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 12 (1995) 19, 22

Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L.J. 325 (Spring 1991) 22

Charles Warren, *Bankruptcy in United States History* (1935) 22

TABLE OF AUTHORITIES – Continued

Page

United States Constitution:

art. I, § 8. 25

art. VI, § 2 25

INTEREST OF THE *AMICI CURIAE*[1]

Amici Curiae are law professors who teach and write in the areas of bankruptcy and constitutional law.[2] *Amici* are not predisposed to debtors or creditors or federal or state governmental bodies. They file this brief in support of the decision below because of the importance of establishing a uniform approach to the problem of State assertion of sovereign immunity in bankruptcy cases. That problem continues to plague fundamental aspects of the bankruptcy system even after this Court's important ruling in *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004) ("*Hood II*"), *affirming on other grounds Hood v. Tennessee Student Assistance Corp. (In re Hood)*, 319 F.3d 755 (6th Cir. 2003) ("*Hood I*").

---

[1] Pursuant to Rule 37 of the Rules of the Supreme Court of the United States, the *amici* file this brief with the written consent of all parties, which are submitted herewith. No counsel for a party authored this brief in whole or in part. No person or entity including *amici* or their counsel made a monetary contribution for the preparation or submission of this brief; it has been prepared *pro bono*.

[2] Susan Block-Lieb is a Professor of Law at Fordham University Law School. Erwin Chemerinsky is the Alston & Bird Professor of Law and Political Science, Duke University School of Law. Margaret Howard is Law Alumni Association Professor of Law at Washington & Lee University. Kenneth N. Klee is a Professor of Law at the University of California at Los Angeles School of Law. Jonathan C. Lipson is an Associate Professor of Law at Temple University, James E. Beasley School of Law. Jeffrey W. Morris is the Samuel A. McCray Chair in Law at the University of Dayton School of Law. Ralph R. Mabey is an adjunct professor and senior lecturer at the J. Reuben Clark Law School, Brigham Young University. Lawrence Ponoroff is Dean and Mitchell Franklin Professor of Law at Tulane Law School. Elizabeth Warren is the Leo Gottlieb Professor of Law at Harvard Law School.

SUMMARY OF ARGUMENT

Amici support the argument made by Respondent Katz on behalf of the bankruptcy estate of Wallace's Bookstores, Inc. ("Wallace's"). This brief points out fundamental differences between the Bankruptcy Code and other statutes at issue in the Court's recent sovereign immunity opinions, and explains the analytical and practical impact of these differences. The brief further describes the intersection of preference law and claims determination under the bankruptcy court's *in rem* jurisdiction. Claims are to be disallowed until a transfer avoidable as a preference is recovered and offset by preference claim amounts, whether or not a proof of claim is filed, as a matter of the bankruptcy court's *in rem* claims adjudication. An order of avoidance is distinct from an order for recovery of an avoided transfer. An order avoiding a preference has preclusive effects on a subsequent recovery action, however, and avoidance and recovery should be litigated together against States, as they are with other preference defendants, including because there is no alternative means for actual recovery of the funds for distribution to creditors.

Second, federally-created bankruptcy estates should be deemed federal entities, unrestricted by sovereign immunity when pursuing rights integral to their statutory functions. These federally-created estates could recover preferences regardless of the scope of *in rem* jurisdiction.

Finally, *amici* explain that the American people abrogated state sovereign immunity when ratifying the Constitution. The Bankruptcy Clause, Article I Section 8, does not merely grant Congress power with respect to bankruptcy, but further expressly codifies the intention to have one uniform bankruptcy law enforceable in every State. This uniformity principle is not a limitation on

federal legislative power, but, to the contrary, demands recognition of Congress' power as one that extends beyond superseding inconsistent state legislation and enables federal bankruptcy orders to bind and be enforceable against States. Several reasons for this conclusion are given, including the historical need for federal discharge orders to be enforced against state debtors' prisons by writs of *habeas corpus*. This would have conflicted with principles of state sovereign immunity but for the constitutional abrogation.

ARGUMENT

I. Bankruptcy Laws Apply and Are Enforced Differently From Other Article I Laws, Requiring a Different Analysis of Sovereign Immunity.

The Bankruptcy Clause, the Bankruptcy Code, and the unique nature of bankruptcy litigation distinguish this case from other sovereign immunity cases decided by this Court. The Virginia Institutions and their *amici* argue that the Bankruptcy Code is no different from any other Article I legislation, and accordingly the Court's *Seminole Tribe* rejection of *Union Gas* and the *Atascadero* dissent means that the Constitution alienated only the power to legislate, not the power to enforce bankruptcy laws. *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 277-78 (1985). None of those cases, however, construed the Bankruptcy Clause.

Wallace's argument here differs from the decision in *Union Gas* and the *Atascadero* dissent because, like Hamilton's analysis in THE FEDERALIST NOS. 32 and 81, it hinges on the specific text of the particular constitutional provision involved, *i.e.*, the Bankruptcy and Naturalization

Clause. The Court has not previously ruled on this analysis, which is limited to this clause, and does not apply to other general Article I clauses such as the Commerce Clause. Unlike the other clauses considered in this Court's abrogation jurisprudence, the Framers of the Constitution expressly emphasized here the need to "establish" bankruptcy law that is "uniform .... throughout the United States." Reinforcing this point, they coupled the Bankruptcy Clause with the Naturalization Clause, another federal power demanding uniform provisions and enforcement.

Moreover, bankruptcy statutes are different in two particularly compelling ways from the tax, commerce and other Article I laws addressed in the Court's recent sovereign immunity cases. First, bankruptcy representatives acting as fiduciaries of bankruptcy estates are not private parties. They are federally designated representatives of federally-created bankruptcy estates, marshaling assets for the benefit of each estates' creditors, and distributing estate assets to those creditors once respective legal entitlements are determined. As noted in section III of this brief, the Eleventh Amendment does not bar suits by federal entities exercising statutory rights fundamental to their functioning.

Second, the substantive provisions of bankruptcy statutes are not regulatory laws and do not apply to the populace at large, nor do they mandate or proscribe any action in the course of everyday affairs. Bankruptcy laws apply only in conjunction with *in rem* bankruptcy cases. The federal government supplies the forum and standards for resolution of issues concerning all bankruptcy estates. Laws enacted under *other* Article I powers are enforceable by federal authorities, so that prevention of suits by private parties does not exempt States from compliance altogether. Bankruptcy preference causes of action, in

contrast, like the ancillary bankruptcy provisions of the automatic stay and the discharge, are enforceable only by representatives of bankruptcy estates and only in the context of specific bankruptcy cases; they are not enforceable by United States Attorneys or federal agencies filing lawsuits for injunctive or declaratory or other relief against businesses or individuals or a State. If federally designated representatives of bankruptcy estates cannot enforce such bankruptcy law provisions when acting in specific debtors' bankruptcy cases, then no one can.

Certainly, the Framers of our Constitution expected that bankruptcy laws, like other federal laws, would be enforceable. *See Railway Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457, 472 (1982) ("The Framers sought to provide Congress with the power to enact uniform laws on the subject enforceable among the States"). This Court has recognized that state sovereign immunity does not mean that States cannot be compelled in court to comply with federal statutes. *See, e.g., Board of Trustees v. Garrett*, 531 U.S. 356, 374 n.9 (2001) (Americans With Disabilities Act could not be the subject of individual lawsuits against States but was still enforceable against States in federal court by federal government); *Alden v. Maine*, 527 U.S. 706, 755-56 (1999) (Fair Labor Standards Act; same). In Bankruptcy Code cases, a specific bankruptcy estate's designated representative is the arm of the federal government to enforce federal law.

Federal bankruptcy law must not be construed so restrictively as to deny a forum for recovery of assets transferred to States as preferred creditors on the eve of bankruptcy. Where there is a federal right, there must ordinarily be a remedy to enforce that right. *Marbury v. Madison*, 1 Cranch 137, 162 (1803); *see Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 271 (1997) (recognizing "the principle

that the plan of the convention contemplates a regime in which federal guarantees are enforceable so long as there is a justiciable controversy. THE FEDERALIST NO. 80, p. 475 (C. Rossiter ed. 1961 (A. Hamilton) ("[T]here ought always to be a constitutional method of giving efficacy to constitutional provisions")).

Bankruptcy law is enforceable through the orders of the federal court having jurisdiction over the bankruptcy estate, because the Framers of the Constitution expressly delegated that sovereign power to the federal government; because the federally-created bankruptcy estate is exercising powers integral to its functions, and because bankruptcy jurisdiction is *in rem*.

II. The Bankruptcy Court Has *In Rem* Jurisdiction Over Preferential Transfers.

A. Resolution of Preferences Is Integral to Collection and Distribution of the *Res*.

This Court affirmed *Hood I* by analyzing the *in rem* nature of bankruptcy cases. *Hood II*, 541 U.S. at 440-41. Preference avoidance is an integral part of claims allowance, which is a fundamental *in rem* determination.

The bankruptcy estate created upon the filing of a bankruptcy case includes causes of action created under the Bankruptcy Code to avoid and recover assets preferentially transferred to creditors pre-filing that result in unequal creditor treatment. 11 U.S.C. §§ 541(a)(1) (all legal and equitable interests in property as of the commencement of the case), 547 (preference cause of action as of commencement of the case). Further, property "that would have been part of the estate had it not been transferred before the commencement of the bankruptcy" is "property of the debtor" that can be recovered and become

"property of the estate." *Begier v. Internal Revenue Service*, 496 U.S. 53, 58 (1990); 11 U.S.C. §§ 541(a)(3) (interest in property recovered under 550), 547 (avoidance of transfers), 550 (to extent of avoidance, recovery of transferred property or its value). The district court, and by referral the bankruptcy court, has exclusive jurisdiction over "all of the property, wherever located, of the debtor as of the commencement of the case" and of "property of the estate." 28 U.S.C. § 1334(e); 28 U.S.C. § 157(a). There is no carve-out for property of the debtor in the possession of a State.

The bankruptcy court's *in rem* jurisdiction encompasses matters relating to claims allowance, including whether the claim is subject to offset or recoupment, which must be resolved in order to allocate property of the estate. *See Hood II*, 541 U.S. at 448; *Gardner v. New Jersey*, 329 U.S. 565, 574 (1947). Determining the allowed amount of a claim entails determining the amount of the bankruptcy estate's offsetting claims or recoupment defenses. *Ossen v. Department of Social Servs. (In re Charter Oak Assocs.)*, 361 F.3d 760, 769 (2d Cir.), *cert. denied*, 125 S. Ct. 408 (2004). Further, claims are outright disallowed if the creditor received a preferential or otherwise avoidable transfer until that transferred property is surrendered to the estate. 11 U.S.C. § 502(d); *see Katchen v. Landy*, 382 U.S. 323, 330 (1966). Thus, whether or not debtor-transferred property is recovered and becomes property of the estate, the transfer may be avoided and the transferee's claim disallowed. 11 U.S.C. §§ 550, 547, 502(d).

A claim may be disallowed even if no proof of claim is filed, including by reason of an avoidable transfer. When a bankruptcy petition is filed, the debtor is obligated to file a schedule of creditors and claim amounts, and is required to designate whether the claims are disputed. 11 U.S.C. § 521(1). Creditors are nonetheless obliged to file proofs of

claim in a chapter 7 case in order to share in a distribution, but in a chapter 9 or 11 case, a proof of claim is deemed filed if the claim is scheduled by the debtor as liquidated, undisputed and not contingent. 11 U.S.C. §§ 502(a), 925, 1111(a); Bankruptcy Rules 3002, 3003. The debtor or trustee may file a proof of claim for a creditor with notice to that creditor, and should do so if a creditor is not listed to enable fair and complete treatment. 11 U.S.C. § 501(c); Bankruptcy Rule 3004; *see Ex parte Christy*, 44 U.S. 292, 315 (1845) ("creditors" are not limited to those who come into court and file claims, but include all present subsisting claims upon the bankrupt's estate); *City of New York v. New York, N.H. & H.R. Co.*, 344 U.S. 293, 296-97 (1953) (known creditor entitled to specific notice of bankruptcy proceeding affecting its lien for order to be binding).

If a distribution is to be made, the trustee is duty-bound to object to allowance of any improper claim. 11 U.S.C. §§ 704(5), 1106(a)(1), 1302(b)(1); *Gardner*, 329 U.S. at 573 (claim objection process is "of basic importance in the administration of a bankruptcy estate" to avoid diluting legitimate claims). An avoided transfer is then preserved for the benefit of the estate. 11 U.S.C. § 551.

B. Bankruptcy Courts Should Be Able to Require Recovery of Avoided Transfers Without State Consent.

Claim disallowance based on receipt of an avoidable transfer is clearly an *in rem* proceeding, the effect of which a State as a creditor cannot escape through an assertion of sovereign immunity. *See Hood II*, 541 U.S. at 448. States are creditors in the vast majority of bankruptcy cases, with claims based on contract, taxation, accidents with state-operated vehicles, and the like. Payments to States

on such claims within 90 days of bankruptcy is common. Avoidance of transfers through claim allowance procedures can thus be accomplished in most cases, but recovery of such transfers is nonetheless critical to equality of distribution and to discouraging creditor favoritism. It is also critical to prevent precipitous creditor actions that would dismember an estate and force a debtor into bankruptcy. *See Begier*, 496 U.S. at 58. Creditors who are concerned that their debtors will make payments to a State would have a strong incentive to initiate bankruptcy cases or take action that would force debtors to file bankruptcy petitions.

The problem of voidable preference payments to States is significant. As this Court noted in *Gardner* in the context of tax liens,

> If the reorganization court lacked the power to deal with tax liens of a State, the assertion by a State of a lien would pull out chunks of an estate from the reorganization court and transfer a part of the struggle over the corpus into tax bureaus and other state tribunals. That would not only seriously impair the power of the court to administer the estate . . . It would fly in the teeth of . . . reorganization court 'exclusive jurisdiction of the debtor and its property wherever located.'

329 U.S. at 577. Indeed, the assertion of sovereign immunity is exacerbated when the State possesses the property at issue instead of taking only a lien against it, as in *Gardner*, because States can resist efforts to recover the property in both state and federal courts, thereby hobbling fundamental bankruptcy goals. *See Printz v. United States*, 521 U.S. 898, 925 (1997) (federal government may not compel States to implement or enforce federal laws); *Alden*, 527 U.S. at 754 (state sovereign immunity extends to suits under federal law brought in state courts); *compare Coeur*

d'Alene Tribe of Idaho, 521 U.S. at 274 (*Ex parte Young* case in which the State possessed land that was an essential attribute of its sovereignty, in contrast to funds transferred on the eve of bankruptcy that are "property of the debtor," and the state court was open to hear and determine the case, unlike preference actions in which state court availability is not assured).

The Virginia Institutions and their *amici* essentially take the position that they can evade any preference exposure whenever they assert sovereign immunity from suit. The *amici* brief of the American Association of State Colleges and Universities et al. asserts that Wallace's preference claims "might have been allowed" if it had only followed procedures of Va. Code Ann. § 2.2-815.A, and that "all other states" have similar procedures for dealing with claims arising out of contracts for goods and services with state agencies or instrumentalities. (Amer. Ass'n Br. at 22 and n.21). The cited Virginia statute has been held not to constitute a waiver of the State's Eleventh Amendment immunity, however. *McConnell v. Adams*, 829 F.2d 1319, 1329 (4th Cir. 1987), *cert. denied*, 486 U.S. 1006 (1988) *citing Edelman v. Jordan*, 415 U.S. 651, 673 (1974). It has been held not to justify suits in federal or state court against Virginia alleging rights under federal statutory law. *Commonwealth v. Luzik*, 259 Va. 198, 207-09, 524 S.E.2d 871 (2000) (Fair Labor Standards Act). Such intermittent waiver statutes cannot be relied upon to authorize preference recovery lawsuits in state court.

The waiver statutes cited by the *amici* illustrate that States have waived sovereign immunity in many respects. If nothing else, this shows that being sued is not nearly the affront they proclaim. On the other hand, States' contention that they can pick and choose when to comply with federal bankruptcy law creates serious problems for

the bankruptcy system. Logically, it means they would be exempt from the automatic stay, property turnover requirements, and other similar Bankruptcy Code obligations. Among other problems, this would give the States unfair leverage *vis-à-vis* other creditors, including the federal government, which is also a creditor in most bankruptcy cases, often for tax liability, and is bound by bankruptcy court rulings. *See* Jonathan C. Lipson, *Fighting Fiction with Fiction – The New Federalism in (a Tobacco Company) Bankruptcy*, 78 WASH. U.L.Q. 1271, 1330 (2000) (arguing that recognizing sovereign immunity destabilizes negotiations in bankruptcy).

Once the bankruptcy court exercises its *in rem* authority to avoid a transfer and to disallow a claim after notice to the creditor, the "normal rules of *res judicata* and collateral estoppel apply," so that "once a bankruptcy court has dealt with the preference issue nothing remains for adjudication" in a subsequent action to recover the asset. *Katchen*, 382 U.S. at 334. As the Court recognized in *Katchen*, to require a second action in such circumstances to recover the transferred asset "would be a meaningless gesture." *Id.* Either the scope of *in rem* jurisdiction should be recognized as extending to recovery of preferences, as Wallace's advocates, or States should be held subject to bankruptcy jurisdiction under the federally-created entity or Plan of the Convention analyses described below. Certainly, if a State appears and litigates the avoidability of a payment it received, it should be held to have waived sovereign immunity for purposes of a proceeding to recover the avoided amount under Bankruptcy Code § 550, even if it did not file a proof of claim.

III. State Sovereign Immunity Is Inapplicable to a Federally-Created Bankruptcy Estate Implementing Bankruptcy Code Provisions.

A. The Eleventh Amendment Does Not Preclude Suits Against States by the United States and Federally-Created Entities.

Congress may authorize the United States to institute legal proceedings against States to protect citizens' federally-guaranteed rights. *United States v. Mississippi*, 380 U.S. 128, 140 (1965). A federally-created entity may likewise sue a State in federal court to enforce federally-created rights without Eleventh Amendment restrictions. *Osborn v. Bank of U.S.*, 22 U.S. 738, 825, 870-71 (1824).

In *Osborn*, the Court found no error in a judgment directing restitution of $98,000 and repayment of an additional $2,000 taken as taxes from the Bank and held by the Ohio State Treasurer in a separate bank account, in which he had no individual interest. *Id.* at 740-41, 870-71. The Court noted that the State was not a named party to the suit and that the State could defend as if it were a party of record. *Id.* at 857, 870. Chief Justice Marshall explained that the Bank of the United States was not a private corporation whose principal object was individual trade and profit, but instead was created for public and national purposes although capable of transacting private as well as public business and trading for its own advantage. *Id.* at 860. Importantly, the rights it asserted in the litigation were founded on and integral parts of the law that created the Bank. *Id.* at 825-27. The State could not prevent restitution to a federal entity in such circumstances. *Id.* at 871.

This Court later held that the mere fact that a corporation was created by Congress would not enable the

entity to sue a State in federal court asserting a state law cause of action that was not an integral part of the law that created the federal entity. *Smith v. Reeves*, 178 U.S. 436, 437, 446 (1900). As in *Osborn*, the suit was nominally against the State Treasurer, but the parties sought a refund of taxes held in the state treasury. *Id.* at 439-40. The determinative factor in the Court's holding was not the Treasurer's capacity, but rather that the State could require that a state law claim, not touching upon any federal right, be litigated in state court, where the federal entity had an adequate remedy. 178 U.S. at 441, 445.

When suing to recover preferentially-transferred "property of the debtor" for equitable sharing among all creditors of the estate, the authorized representative of a bankruptcy estate is "exactly the same as that of the Bank of the United States" pursuing "a right arising under a law of the United States. . . . " *Claflin v. Houseman*, 93 U.S. 130, 135 (1986); *see Ex parte Christy*, 44 U.S. at 312. As with *Osborn*, preference causes of action are an integral part of the law that creates federal bankruptcy estates. They accrue only upon the filing of a bankruptcy petition, are a fundamental part of the marshaling of the federally-created bankruptcy estate, and benefit only creditors of that bankruptcy estate. If there are sufficient funds in the estate for all creditors to be paid in full, the cause of action does not come into existence. 11 U.S.C. § 547(b)(5). For these reasons *Osborn*, not *Smith*, is apt and controls this case.

B. Bankruptcy Estates May Assert Preference Claims Against States.

Bankruptcy estates act through representatives authorized by the Bankruptcy Code and court. The representative usually is a trustee, appointed by, subject to

removal by, and supervised by the bankruptcy court and by the United States Trustee, who in turn is appointed by, subject to removal by, and supervised by the United States Attorney General. 28 U.S.C. §§ 582, 586(a)(1), (3), (c), (d); 11 U.S.C. §§ 701, 1104. A trustee can only be compensated in an amount approved by the bankruptcy court and cannot engage professionals without court approval; the court also has authority to remove the trustee from a particular case for cause. 11 U.S.C. §§ 324(a), 326(a), 327(a). The estate representative may be a court-appointed liquidator under a confirmed reorganization plan, as in Wallace's, holding the rights and powers of a bankruptcy trustee. 11 U.S.C. § 1123(b)(3)(B). In chapter 11 cases, the representative may be the debtor in possession, where the debtor is empowered with rights and performs functions and has duties of a trustee, rather than acting in a private capacity. 11 U.S.C. § 1107. The Bankruptcy Code expressly authorizes the representative of the estate to sue and be sued. 11 U.S.C. § 323; 28 U.S.C. § 1334.

Whoever the authorized representative, the person acts on behalf of a federally-created bankruptcy estate that serves as a mechanism to transfer a debtor's assets to creditors. *See* Ralph Brubaker, *On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory*, 41 WM. & MARY L. REV. 743, 814-30 (2000). The debtor is not a "new legal person" but the "estate" is a new *res*, under new control of a trustee and court, with creditors becoming new beneficial interest holders, and with new legal rights and responsibilities. *National Labor Relations Board v. Bildisco & Bildisco*, 465 U.S. 513, 528-29 (1984); *Katchen*, 382 U.S. at 336; *Hansen, Jones & Leta, P.C. v. Segal*, 220 B.R. 434, 451-54 (D. Utah 1998).

While not at issue in this case, jurisdiction of federal district courts to adjudicate state law collection suits brought by bankruptcy estates depends on those estates being federal entities. There is no diversity of citizenship or ordinary federal question jurisdiction in such cases; they depend on the relationship of the state lawsuit to the bankruptcy estate. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 72 n.26 (1982); *Williams v. Austrian*, 331 U.S. 642, 658-60, 664 (1947). Further, the bankruptcy trustee or other estate representative is an officer of the appointing court entitled to quasi-judicial immunity for actions integrally related to the adjudication of the bankruptcy case, who may be sued for such actions only with leave of the appointing court. *In re Castillo*, 297 F.3d 940, 947-53 (9th Cir. 2002) (analysis of bankruptcy trustees' immunity from common law to the present); *Matter of Linton*, 136 F.3d 544, 545 (7th Cir. 1998) ("a trustee in bankruptcy is working in effect for the court that appointed or approved him, administering property that has come under the court's control by virtue of the Bankruptcy Code"); *see also In re Barman*, 252 B.R. 403, 412-13 (Bankr. E.D. Mich. 2000) (bankruptcy trustee is "state actor" for Fourth Amendment purposes when inspecting a debtor's residence to look for estate assets).

The bankruptcy estate (and with respect to discharge also the individual debtor) constitutes the *res* that supports *in rem* jurisdiction. *See Hood II*, 541 U.S. at 440-41; *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 191-92 (1902). Through its representative, the bankruptcy estate may pursue federally-created preference, turnover, stay violation and other causes of action, as well as state law claims. 11 U.S.C. §§ 547, 542. Preference claims are core proceedings arising under the Bankruptcy Code, as are estate counterclaims against creditor claimants and

creditor claim determinations. 28 U.S.C. §§ 157(b)(2)(B), (C), (F). The preference claims at issue here did not exist before the bankruptcy case was filed, and are fundamental components of the collection and distribution of bankruptcy estates.

As previously explained, unlike the tax, commerce and other Article I laws resolved in the Court's recent sovereign immunity cases that are enforceable by federal authorities, bankruptcy causes of action, including preference actions, are enforceable only by the estate representative designated by the court. 11 U.S.C. § 547(b); *see Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 7-9 (2000). Claim allowance proceedings can be commenced by any party in interest, but they, too, arise only in the context of specific bankruptcy cases, and cannot be litigated by United States Attorneys or federal agencies in state court or non-bankruptcy federal court suits. 11 U.S.C. § 502(a). The United States Trustee, appointed by the Attorney General, is a party in interest in bankruptcy cases who can review and monitor them, but the United States Trustee can sue to assert preference and similar rights only when appointed to serve as a trustee in a specific case. 28 U.S.C. § 586. Unless estate representatives can enforce such bankruptcy law causes of action on behalf of specific debtors' bankruptcy estates, no one can do so.

IV. The American People Allocated Bankruptcy Jurisdiction to the Federal Government to Bind State Authorities.

These *amici* join and support the briefs filed by Wallace's and by noted legal historian *amicus* Prof. Bruce Mann in their analysis of the historical framework in which the Bankruptcy Clause was drafted, and its import

in interpreting that clause. An article by Hon. Randolph J. Haines, *The Uniformity Power: Why Bankruptcy Is Different*, 77 AM. BANKR. L.J. 129, 139, 174 (2003) ("Haines"), also provides a background explanation of the relevant issues. This brief expands on three points referenced in the briefs and the Haines article with respect to the surrender of immunity in the Plan of the Convention.

First, however, *amici* respond to the argument of the Virginia Institutions and their *amici* that, in effect, the Court has already decided these arguments against Wallace's. This Court has never, in *Seminole Tribe* or elsewhere, addressed the Plan of the Convention analysis for the surrender of state sovereign immunity in bankruptcy.[3] This Court has, however, repeatedly recognized that while Congress cannot abrogate sovereign immunity whenever it has legislative authority, *e.g.*, in Article I, the States surrendered some portions of their sovereignty through the Constitution in the rare circumstances referenced in FEDERALIST 32. The majority opinion in *Seminole Tribe* itself twice acknowledges that the States enjoy immunity except where there was a "surrender of this immunity in the plan of the convention." *See Seminole Tribe*, 517 U.S. at 68 & n.13. *See also Alden*, 527 U.S. at 713 (referring to retention of sovereignty by States "except as altered by the plan of the convention"); *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991) (recognizing express consent to suit, consent through the Plan of the Convention, and abrogation as grounds for loss of immunity); *Hans v. Louisiana*, 134 U.S. 1, 13 (1890) (discussing

[3] *See Hood II*, 541 U.S. at 454, where the phrase "[e]ven if we were to hold that Congress lacked the ability to abrogate sovereign immunity under the Bankruptcy Clause" indicates that the Court had not already so held in *Seminole*.

immunity as an inherent attribute of state sovereignty "[u]nless, therefore, there is a surrender of this immunity in the plan of the convention").

This Court has also recognized that the States surrendered their immunity as to suits against entities created under the Interstate Compact Clause, Article I, section 10, clause 3 of the Constitution. *See Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 41-42 (1994). The Court found that the Port Authority could be sued in federal court because, as "part of the federal plan prescribed by the Constitution, the States agreed to the power sharing, coordination, and unified action that typify Compact Clause creations." *Id.*; *see also id.* at 56 (J. O'Connor, dissenting) ("the crux of the Court's analysis rests on its apparent belief that the States ceded their sovereignty in the interstate compact context in the plan of the convention").

A. The Bankruptcy Clause Was Intended to Encompass Immunity From Suit.

Hamilton explained that the Plan of the Convention included a surrender of state sovereign immunity where the Constitution "granted an authority to the Union, to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*." *See* THE FEDERALIST NO. 32 at 192 (Robert Scigliano, ed. 2000) (emphasis in original). As an example of this type of federal authority, Hamilton cited to the power over naturalization, which appears together with the federal bankruptcy power in the same constitutional clause.

Today, to speak of state immunity from bankruptcy as "absolutely and totally contradictory and repugnant" may seem a bit extreme. The Framers of the Constitution,

however, had a different perspective. In 1789, a discharge of debts was profoundly bound up with the powers of the sovereign, rather than merely an issue between individual debtors and their creditors.

First, at the time of ratification, a bankruptcy discharge meant a release from debtors' prison, not merely a fresh financial start. "The only consistency among debt laws in the eighteenth century was that every colony, and later every state, permitted imprisonment for debt – most on *mesne* process, and all on execution of a judgment." Bruce H. Mann, *Republic of Debtors: Bankruptcy in the Age of American Independence* 79 (Harvard U. Press 2002); *see also* Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 12 (1995). Early colonial and state insolvency relief laws were brief and limited, providing for release from imprisonment, often without a discharge from debt, and in some instances either assigning property to creditors or even binding debtors in service to their creditors. Mann at 51-53, 79-80, 177-79. The first federal bankruptcy act, enacted in 1800 following ratification of the Constitution, provided for a discharge, not only of debts but also of the person of the debtor from debtors' prison. *See id.*; Bankruptcy Act of 1800, Sess. I, Ch. 19, §§ 34, 38.

Thus, the creation of a discharge by federal statute directly conflicted with the sovereign authority of the States to punish and imprison debtors, and to impose their own terms for release. An effective, and uniform, federal law would have been impossible if the States could not be bound by the federal discharge, as only the States could give it effect by releasing debtors from their prisons. Legislative preemption alone would have been insufficient to bind States to obey bankruptcy discharge orders. Moreover, state action alone, without the unifying influence of federal

authority, would be unable to create a uniform system for the discharge of debts. State authority in this respect is necessarily limited both by the contracts clause of the United States Constitution and by the States' limited territorial authority. *See Ogden v. Saunders*, 25 U.S. (12 Wheat) 213 (1827) (discussing nature of state and federal authority over bankruptcy issues); *Sturges v. Crowninshield*, 17 U.S. (4 Wheat) 122 (1819) (same).

Second, in ratifying the Constitution, the States were also aware of the diversity of existing state approaches to bankruptcy:

> Prior to the drafting of the Constitution, at least four States followed the practice of passing private Acts to relieve individual debtors. Given the sovereign status of the States, questions were raised as to whether one State had to recognize the relief given to a debtor by another State. Uniformity among state debtor insolvency laws was an impossibility and the practice of passing private bankruptcy laws was subject to abuse if the legislators were less than honest. Thus, it is not surprising that the Bankruptcy Clause was introduced during discussion of the Full Faith and Credit Clause. The Framers *sought to provide Congress with the power to enact uniform laws on the subject enforceable among the States.*

Gibbons, 455 U.S. at 472 (1982) (internal citations omitted) (emphasis added); *see* Mann at 51-53, 55, 59-61, 79, 177-80, 183. If the States' immunity had not been surrendered, the Constitution's grant of power to Congress to create a uniform bankruptcy system, "*enforceable among the States*," would have been meaningless.

Third, when the Constitution was drafted and ratified, delinquent debt was extensive and held across state borders. The economic impact of wars, accompanied by

disruption of foreign trade, post-war contractions, and consequent commercial risks, and the vagaries of business in an era before insurance, had led to economic declines and failures by merchants of integrity. *E.g.*, Mann at 55-57, 83-84, 102, 169-71, 176-77. The indebtedness was public as well as private, in part because States as well as Congress had issued bills of credit and loan certificates to purchase supplies and pay soldiers on the promise of paying interest or accepting them in payment of taxes. *Id.* at 169-70. Speculation in public debt by investors was rampant. *Id.* at 175-76.

Key delegates to the constitutional convention were aware of this, and aware of pending issues of applying state insolvency and bankruptcy rules to debtors and creditors who lived in different States, and the value of addressing the issue on a national level. *Id.* at 185. One of the Pennsylvania lawyer delegates to the convention had a pending case in which he was defending a debtor who had received a Maryland discharge, then been imprisoned by a Pennsylvania creditor for unpaid debt, in which he was arguing the obligation of one State to recognize another State's discharge. *Id.* at 184-85. He had recently received a decision for another client holding that under the Articles of Confederation, a discharge by a New Jersey court shielded a debtor from arrest in that State, but did not bind Pennsylvania courts or discharge him from being imprisoned in Pennsylvania for another debt. *Id.* at 184.

Records of ratification debates in the States also include recognition by at least some of the participants that the purpose of the constitutional provision empowering Congress to establish uniform laws on bankruptcy was for a bankruptcy determination "when conformed to in one state" to be "effectual to secure the debtor throughout the union." *Id.* at 186 n.35 (citing a delegate to the Connecticut ratifying

convention, Samuel Holden Parson to William Cushing, Jan. 11, 1788, in DHRC, 3:572).

The impact of uniformity was likewise recognized by Anti-federalist writers. "The anonymous 'Federal Farmer' argued that even if uniform bankruptcy laws were practicable – which he thought unlikely given 'the extent of the country, and the very different ideas of the different parts in it, respecting credit, and the mode of making men's property liable for paying their debts' – a federal bankruptcy power was nonetheless an interference 'with the internal police of the separate states, especially with their administering justice among their own citizens.'" *Id.* at 187.

Fourth, bankruptcy was tied to state sovereignty because of its relationship to state policy and economic power. The first federal bankruptcy act provided relief only to merchants or traders, and was opposed by agrarian and plantation interests. *See* Mann at 216-19; Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 Am. Bankr. L.J. 325, 346 (Spring 1991); Charles Warren, *Bankruptcy in United States History* at 18-19 (1935). Continuing opposition resulted in the repeal of the first act in 1803, only three years after it was passed. *See* Tabb, *History of the Bankruptcy Laws*, *supra*, at 15; Warren, *supra*, at 21.

Thomas Jefferson himself opposed federal bankruptcy legislation because he perceived the proposed laws as pro-merchant and anti-agrarian. Jefferson was particularly concerned that federal law would eliminate some of the protections provided to debtors under existing state laws. *See* Warren at 16; Mann at 197. For example, Virginia state law at the time protected freehold lands from execution. *See id.* As Jefferson recognized, the federal bankruptcy power superseded the States' control of lands

within their own borders, a direct affront to their sovereignty.

Through the Bankruptcy Clause, the people granted the federal government the authority to control citizens, contracts and commerce that would otherwise have been under state control. The people even handed the federal government the keys to state prisons when it came to bankrupt debtors. This is the context in which this Court should analyze state sovereign immunity from suit on bankruptcy claims.

B. Bankruptcy Uniformity Is Not Merely Geographical, but it Restricts Sovereign Immunity as Well.

The Virginia Institutions and their *amici* contend that the uniformity provision in the Bankruptcy Clause is a limitation on the power of Congress, rendering it less potent than other Article I powers, particularly because it does not include a "dormant" preclusion of state laws in the absence of a federal bankruptcy law and national bankruptcy statutes were so difficult to enact and retain. Rather, the breadth of the effect of a national bankruptcy law demonstrates why the political hurdles referenced in section IV A of this brief loomed so large.

The Court has interpreted the Bankruptcy Clause uniformity language in several contexts, none bearing on sovereign immunity, except to the extent that Chief Justice Marshall observed in the first interpretation of the Bankruptcy Clause that "[t]he peculiar terms of the grant [of bankruptcy power] certainly deserve notice" because "Congress is not authorized merely to pass laws, the operation of which shall be uniform, but to establish

uniform laws on the subject throughout the United States." *Sturges*, 17 U.S. (4 Wheat.) at 193-94.

In *Vanston Bondholders*, Justice Frankfurter said that one type of uniformity was geographic. *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 172 (1946) (the uniformity provision "is a requirement of geographic uniformity") (Frankfurter, J., concurring). But he did not foreclose other types of uniformity, and the majority in *Vanston Bondholders* reasoned that federal courts must enforce federal bankruptcy law, not just treat state laws uniformly. In *Moyses*, the Court held that uniformity permitted debtors to use exemptions that varied by State, which it found to be consistent with a concept of geographic uniformity. *Moyses*, 186 U.S. at 190.

In *Gibbons*, however, the Court applied "uniformity" in a non-geographical context, and held that private bankruptcy bills applicable to a single debtor are prohibited. In so holding, *Gibbons* followed an earlier case holding that uniformity requires that the law be applied equally to all creditors and debtors. *Gibbons*, 455 U.S. at 469-71; *Blanchette v. Connecticut Gen. Ins. Corps.*, 419 U.S. 102, 160 (1974). If, as in *Gibbons*, uniformity means that all similarly situated debtors must be treated alike, the same should hold true for all similarly situated creditors – including States. *See* Lipson, *supra*, 78 WASH. U.L.Q. at 1335-36 (arguing that sovereign immunity "should not entitle States to become the ultimate 'holdouts'").

None of these cases holds that Congress is prohibited from adopting a bankruptcy law imposing even greater uniformity by forbidding a State or any other creditor from opting out. Haines at 163-64. The Virginia Institutions overlook the fact that the Bankruptcy Clause is found in Section 8 of the Constitution, "Powers of Congress," not

Section 9 on "Prohibited Powers." Haines at 167. Like the Necessary and Proper Clause, it is a grant of power instead of a limitation. *See McCulloch v. Maryland*, 17 U.S. 316, 419-20 (1819). When the Founding Fathers wanted to impose restrictive uniformity requirements, they did so, as illustrated by the uniformity language in the Constitution's taxing power provision. U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power to lay and collect Taxes . . . but all Duties, Imposts and Excises shall be uniform. . . ."). Likewise, when the Framers of the Constitution wanted to provide for legislative supremacy alone, they specified that whenever federal and state laws are inconsistent, federal laws supersede state requirements under the Supremacy Clause. U.S. CONST. art. VI, § 2.

The FEDERALIST PAPERS explain that there is a sovereign immunity aspect to the Bankruptcy Clause uniformity provision; it is not a superfluous restating of the Supremacy Clause. As this Court recognized in *Seminole Tribe*, Hamilton did not say that whenever Congress has legislative authority (*e.g.*, in Article I), it can abrogate sovereign immunity. Rather, Hamilton explained in FEDERALIST NO. 81 that this would happen only in the rare circumstances referenced in FEDERALIST NO. 32. He thus distinguished between general Article I powers where the Supremacy Clause would override States' reserved legislative authority and specific instances when state sovereignty was completely "alienated." FEDERALIST NO. 81. The naturalization powers he referenced, like the bankruptcy powers *found in the same clause*, require that States accede to federal authority. Madison explained that States could not make their own different decisions on qualifications for citizenship in the nation. FEDERALIST NO. 42. Likewise, States could not make their own different

decisions on whether a federally discharged debtor should be released from their state prisons, because, as Madison recognized, debtors and their property "may lie or be removed into different States," affecting the regulation of commerce and fraud. *Id.*

C. Bankruptcy Laws in Their Entirety Were Intended to Be Enforceable Against States.

The Virginia Institutions and their *amici* argue that the Framers of the Constitution never intended to authorize bankruptcy preference litigation against States, because bankruptcy laws of that era did not authorize suits of any kind against the government. The concept of preference liability existed, however. "There is no dispute that actions to recover preferential or fraudulent transfers were often brought at law in late 18th-century England." *Grandfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 43 (1989); *Schoenthal v. Irving Trust Co.*, 287 U.S. 92, 94 (1932); *see* Mann *amicus* brief.

Whether prior statutes authorized preference recoveries from the government is not the point, however, any more than whether debts held by governmental creditors were discharged under those laws. The critical point is that the concept of bankruptcy when the Constitution was ratified necessarily contemplated and intended to enforce federal rulings against state governments in the form of the discharge of debtors from state debtors' prisons. The current Bankruptcy Code gives debtors a "fresh start," free of various types of debt. *Perez v. Campbell*, 402 U.S. 637 (1971). In 1789, however, a bankruptcy discharge was integrally connected to the powers of the sovereign, rather than merely an issue between individual debtors and their creditors, because of debtors' prisons.

Importantly, the means for enforcement of the federal discharge in the first federal bankruptcy act was a writ of *habeas corpus* operating directly against state jailers in their official capacities. If the bankrupt debtor were arrested after discharge on account of a prepetition debt, any federal judge in the district or the judgment court could issue a writ of *habeas corpus* ordering the state jailer to discharge the bankrupt. Act of 1800 § 38; Haines at 178. This was a direct infringement on state sovereignty. Contrary to the premise of sovereign immunity that the king can do no wrong, the writ of *habeas corpus* permitted a court to determine whether the king (or State) in fact did wrong by imprisoning a citizen without legal cause under the court's legal standards. Haines at 182.

When the Constitution was written, the federal writ enforcing a discharge from state debtors' prison would have been understood as an invasion of state sovereignty. The writ was served on a state prison official, but could not have been justified under an *Ex parte Young* immunity exception. *Ex parte Young*, 209 U.S. 123 (1908). *Ex parte Young* was not decided for another 100 years, and the "fiction" on which it is based was discredited in the Constitutional era and did not provide a rationale for federal enforcement of a debtor's discharge against a state authority. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 114 n.25 (1984) (*Ex parte Young* authority-stripping theory a "fiction"). Justice Marshall held the opposite of *Ex parte Young*: When a state official was sued in his official capacity and had violated no law that would render him liable in a personal capacity, the State itself was considered a party on the record, and the federal court lacked jurisdiction under the Eleventh Amendment. *Governor of Georgia v. Madrazo*, 26 U.S. 110, 123-24 (1828).

Yet a federal discharge was enforced through *habeas corpus* as soon as the federal bankruptcy law – debated for years – finally was enacted in 1800. This was a new provision, absent from the English counterpart law, and needed because of the unique federal and state dual sovereigns in the United States. Haines at 178-79. Statutory federal *habeas* jurisdiction over state prisoners outside of bankruptcy was not enacted until 67 years after it was authorized under the first bankruptcy act of 1800. Haines at 191. Bankruptcy was thus the only context at that time in which a federal court could order a State to discharge a prisoner who had violated a state law.

That Congress, in 1800, was willing to take the dramatic, and at the time unprecedented, step of passing legislation directly cutting deeply into state sovereignty strongly suggests that the uniformity language of the Bankruptcy Clause was no accident and no casual, ambiguous, limiting principle. Rather, it was reflective of the understanding at the time that the needs of a uniform bankruptcy law "throughout the United States" would impinge on state sovereignty. The most sensible interpretation is that the Bankruptcy Clause was intended to overcome state sovereign immunity. *See Marsh v. Chambers*, 463 U.S. 783, 790 (1983) (express consideration and resolution of difficult constitutional issues by the First Congress provides contemporaneous and weighty evidence of the Constitution's meaning).

The conclusion to be drawn from history is that the concept of a uniform bankruptcy law is comparable to the uniform naturalization laws to which Hamilton referred in THE FEDERALIST. Under the Constitution's federal system, citizens were citizens of the nation. No state government could refuse to recognize a person's national citizenship, and no state government could imprison a bankrupt

person or refuse to recognize his bankruptcy discharge in the face of contrary federal law. For the States to be permitted to flout federal bankruptcy authority would have been "contradictory and repugnant" to the Constitutional scheme. Yet if this Court reverses the Court of Appeals for the Sixth Circuit, States will indeed be permitted to flout federal bankruptcy authority, and scuttle the uniformity power granted by the Constitution.

CONCLUSION

States as creditors have an enormous impact on bankruptcy cases and on the rights of both debtors and other creditors. States benefit when estate representatives recover preferences from other parties and distribute the proceeds equitably to all, but want a special dispensation from turning over preferential receipts themselves. If States are able to "opt out" of the federal bankruptcy system, that system is seriously threatened in a variety of ways, including:

- Impeding the fresh start promised by the Bankruptcy Code – one of the Code's "primary purposes" – when they opt out of automatic stay enforcement. *See, e.g., Perez*, 402 U.S. at 648 (1971).
- Frustrating fairness to creditors, and "a ratable distribution of assets among the bankrupt's creditors" – additional primary purposes of federal bankruptcy law. *Vanston Bondholders*, 329 U.S. at 161; *Gardner*, 329 U.S. at 577.
- Hampering the "orderly and expeditious" resolution of estates – yet another "fundamental purpose" of the bankruptcy system,

> *Irving Trust*, 288 U.S. at 333 – and allowing States to "pull out chunks of an estate from the reorganization court and transfer a part of the struggle over the corpus into . . . state tribunals," thus "seriously impair[ing] the power of the court to administer the estate." *Gardner*, 329 U.S. at 577.

Binding States as creditors to bankruptcy determinations of core issues in the *in rem* proceedings over bankruptcy estates is not only constitutional, but sound and appropriate. Once avoidance of a preferential transfer is determined by the federal court, precluding the necessary second step of actual recovery unless the State consents is unsound, frustrates federal law and fundamental legal policies by foreclosing a remedy for a federal statutory violation, and contravenes the intent of the Framers of the Constitution. This Court should affirm the Sixth Circuit's decision for the reasons set forth by Wallace's brief, by Professor Mann in his brief and scholarly work, and by this brief.

Respectfully submitted,

SUSAN M. FREEMAN
Counsel of Record
LEWIS AND ROCA LLP
40 North Central Avenue
Phoenix, AZ 85004-4429
602-262-5756

RICHARD LIEB
KRONISH LIEB WEINER & HELLMAN, LLP
1114 Avenue of the Americas
New York, NY 10036-7798
212-479-6020

Counsel for Amici Curiae

SUPREME COURT, U.S.
FILED
AUG 22 2005
OFFICE OF THE CLERK

No. 04-885

IN THE

Supreme Court of the United States

CENTRAL VIRGINIA COMMUNITY COLLEGE, VIRGINIA MILITARY INSTITUTE, NEW RIVER COMMUNITY COLLEGE, and BLUE RIDGE COMMUNITY COLLEGE,

Petitioners,

v.

BERNARD KATZ, Liquidating Supervisor of the Bankruptcy Estate in *In re Wallace's Bookstores, Inc.*,

Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF HISTORIAN BRUCE H. MANN, *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

BRADY C. WILLIAMSON *
LAFOLLETTE GODFREY & KAHN
One East Main St., Suite 500
Madison, WI 53703
(608) 257-3911

* Counsel of Record

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 5

I. PETITIONERS AND THE *AMICI CURIAE* THAT SUPPORT THEM MISUNDERSTAND THE HISTORY OF BANKRUPTCY 5

II. WIDESPREAD BUSINESS FAILURES AND INCREASING PRIVATE DEBT PROMPTED COLONIES IN THE 1750s AND STATES IN THE 1780s TO EXPERIMENT WITH BANKRUPTCY LEGISLATION 13

III. DELEGATES TO THE CONSTITUTIONAL CONVENTION RECOGNIZED THE IMPORTANCE OF A UNIFORM LAW OF BANKRUPTCY THAT APPLIED TO ALL DEBTORS AND CREDITORS 18

IV. IN THE RATIFICATION DEBATES, FEDERALISTS AND ANTIFEDERALISTS ALIKE UNDERSTOOD THAT THE FEDERAL BANKRUPTCY POWER ENTAILED AN ABROGATION OF STATE SOVEREIGNTY BY BINDING STATES TO DISCHARGES 23

V. THOMAS JEFFERSON OPPOSED THE FEDERAL BANKRUPTCY POWER AS AN INVASION OF STATE AUTHORITY 26

VI. THE BANKRUPTCY ACT OF 1800 STRENGTHENED NATIONAL AUTHORITY AT THE EXPENSE OF THE STATES 28

CONCLUSION 33

TABLE OF AUTHORITIES

Page

CASES

Hood v. Tennessee Student Assistance Corp., 319 F.3d 755 (6th Cir.), *aff'd on other grounds*, 541 U.S. 440 (2004) 2, 3

In re Wallace's Bookstores, Inc. (No. 01-50545) (Bkr. E.D. Ky.) 2

James et al. v. Allen, 1 U.S. (1 Dall.) 188 (Pa. C.P. Phila. Co. 1786) 17, 18

Katz v. Central Virginia Community College (In re Wallace's Bookstores, Inc.), 106 Fed. Appx. 341 (6th Cir. 2004) 2

Millar v. Hall, 1 U.S. (1 Dall.) 229 (Pa. 1788) 7, 19

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) 2

Tennessee Student Assistance Corp. v. Hood, 541 U.S. 440 (2004) 1, 3

United States v. Fisher, 6 U.S. 358 (1805) 27

STATUTES

"An Act for the Regulation of Bankruptcy," 12 *The Statutes at Large of Pennsylvania from 1682 to 1801* (James T. Mitchell and Henry Flanders comps., 1906) 15

"An Act for the relief of Insolvent Debtors within the Colony of New York with respect to the imprisonment of their persons," 2 *The Colonial Laws of New York from the Year 1664 to the Revolution* (1894) 11

11 U.S.C. § 106(a) 2

Bankruptcy Act of 1800, "An Act to establish an uniform system of Bankruptcy throughout the United States," 2 Stat. ch. 19, § 4 ..... passim

U.S. Const., art. I, § 8, cl. 4. ..... 1, 3, 15, 28

OTHER PRIMARY AUTHORITIES (PUBLISHED)

[N.N.], *Some Reflections on the Law of Bankruptcy: Wrote at the Desire of a Friend: Shewing, That such a Law would be beneficial to the Publick, and analogous to Reason and our Holy Religion* (1755) 4, 5, 6, 14

An Additional Number of Letters From the Federal Farmer to the Republican Leading to a Fair Examination of the System of Government Proposed by the Late Convention; To Several Essential and Necessary Alterations in It; And Calculated to Illustrate and Support the Principles And Positions Laid Down in the Preceding Letters (1788), 2 Herbert J. Storing ed., *The Complete Anti-Federalist* 214 (1981) 22

Aurora, or General Advertiser (Philadelphia), Mar. 18 and 29, 1800 26

Circular Letters of Congressmen to Their Constituents, 1789-1829 (Noble E. Cunningham, Jr., ed., 1978) 27

Forlorn Hope (New York), Apr. 7 and 19, 1800 9

Opinions, Questions, and Answers on the Bankruptcy Act, May 27, 31, 1800, *The Papers of Aaron Burr, 1736-1836*, ser. I, reel 4, frames 656-83 (Mary-Jo Kline ed., microfilm ed., 1977) 9

The Debates and Proceedings in the Congress of the United States 7, 8, 25, 27

The Documentary History of the Ratification of the Constitution (Merrill Jensen *et al.*, eds., 1976) 20

The Federalist No. 42 (James Madison) (Jacob E. Cooke ed., 1961) 20, 21, 22

The Law Practice of Alexander Hamilton: Documents and Commentary (Julius Goebel, Jr., and Joseph H. Smith, eds., 1969) 15

The Papers of Thomas Jefferson (Julian P. Boyd *et al.* eds., 1990) 23, 24

The Records of the Federal Convention of 1787 at 447-48 (Max Farrand ed., 1937) 16

OTHER PRIMARY AUTHORITIES (MANUSCRIPT)

"Draft opinion on Case of Mr. [Jacob] Cuyler" (May 11, 1802), Richard Harison Papers, box 4, New-York Historical Society, New York 10

"Memorandum for Mr. [Nicholas] Low respecting Mr. [Jacob] Halletts bankruptcy" (Oct. 18, 1800), Robert Troup Papers, box 2, folder 1, New York Public Library, New York 10

"Peter Blight," Records of the U.S. District Court for the Eastern District of Pennsylvania, Bankruptcy Act of 1800, Record Group 21, National Archives—Mid-Atlantic Region, microfilm 993, reels 4-5 28

Bayard Family Papers, Library of Congress, Washington, D.C. 25

Clement Biddle Letterbook, 1789-1792, Historical Society of Pennsylvania, Philadelphia 6

Peter Stephen DuPonceau, Precedent Book, 1785-1798, Peter Stephen DuPonceau Papers, Historical Society of Pennsylvania, Philadelphia 18

Theodore Sedgwick Papers, Massachusetts Historical Society, Boston 25, 26

William Samuel Johnson Papers, Connecticut Historical Society, Hartford, Connecticut 11

SECONDARY AUTHORITIES

Bruce H. Mann, *Republic of Debtors: Bankruptcy in the Age of American Independence* (2002) ..... passim

E. James Ferguson, *The Power of the Purse: A History of American Public Finance, 1776-1790* (1961) 12

In Debt to Shays: The Bicentennial of an Agrarian Rebellion (Robert A. Gross ed., 1989) 15

John J. McCusker and Russell R. Menard, *The Economy of British America, 1607-1789, with Supplementary Bibliography* (1991) 12

INTEREST OF THE *AMICUS CURIAE*[1]

Amicus Curiae teaches and writes on the history of bankruptcy. He is the author of *Republic of Debtors: Bankruptcy in the Age of American Independence* (Harvard University Press 2002). His interest in this case lies solely in ensuring that legal issues that rest, even in part, on historical arguments are decided on the best historical evidence possible. He is not predisposed for or against debtors, creditors, or federal or state governmental bodies. He files this brief because this case, which addresses an issue of vital importance to the bankruptcy system, turns in large part on eighteenth-century American history.[2]

SUMMARY OF ARGUMENT

Petitioners—Central Virginia Community College, Virginia Military Institute, New River Community College, and Blue Ridge Community College—have stated the issue in this fashion: "May Congress use the Article I Bankruptcy Clause, § 8, cl. 4. to abrogate the States' sovereign immunity." Brief of the Petitioners, p. i. Although that may be one way to frame the issue, the more precise question raised by the opinion of the United States Court of Appeals

---

[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court of the United States, the *amicus* files this brief with the written consent of all parties, which are submitted with this brief. The petitioners' consent was given generally. The respondent's consent came in an August 15, 2005 letter. No counsel for a party wrote this brief in whole or in part. No person or entity other than the *amicus* or his counsel made a monetary contribution for the preparation or submission of this brief; it has been prepared *pro bono*.

[2] Bruce H. Mann, J.D., Ph.D., is Leon Meltzer Professor of Law and Professor of History at the University of Pennsylvania. He filed an *amicus curiae* brief in *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004) ("*Hood II*").

in *Hood v. Tennessee Student Assistance Corp.*, 319 F.3d 755 (6th Cir.), *aff'd on other grounds*, 541 U.S. 440 (2004) ("*Hood I*"), which controlled the judgment from which petitioners here sought certiorari, is whether the states surrendered their sovereignty in bankruptcy matters through the adoption and ratification of the Constitution.[3]

If the states did surrender their sovereignty in bankruptcy matters, then any attempted abrogation by Congress is, at worst, redundant. *See* 11 U.S.C. § 106(a). This issue is specific to bankruptcy and the Bankruptcy Clause. It was not addressed in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), or in any of the Court's subsequent cases on the scope of the Eleventh Amendment and the sovereign immunity of the states.

Bernard Katz, the court-appointed liquidating supervisor of the bankruptcy estate of Wallace Bookstores, Inc., commenced adversary proceedings in the U.S. Bankruptcy Court for the Eastern District of Kentucky against petitioners to recover preferential payments that each had received. *See In re Wallace's Bookstores, Inc.* (No. 01-50545) (Bkr. E.D. Ky.). Petitioners moved to dismiss the proceedings on the ground of sovereign immunity. The Bankruptcy Court denied the motions in multiple proceedings. *Id.* The U.S. District Court for the Eastern District of Kentucky and the United States Court of Appeals for the Sixth Circuit both affirmed, relying on *Hood I*. *Katz v. Central Virginia Community College (In re Wallace's Bookstores, Inc.)*, 106 Fed. Appx. 341 (6th Cir. 2004).

---

[3] "Because the sole basis for the [Sixth Circuit's] decision [here] was its previous decision in *Hood I*, this court is, for all practical purposes, reviewing the correctness of the [sovereign immunity] holding in *Hood I*." Petitioners' Brief, p. 10.

Petitioners argue that the Eleventh Amendment bars actions to recover preferences against unconsenting States, notwithstanding the bankruptcy power conferred in art. I, § 8, cl. 4. However, petitioners did not limit their petition for a writ of certiorari to this narrower issue. Rather, they have invited the Court to address the larger issue of whether Congress may abrogate the sovereign immunity of the States pursuant to the bankruptcy power, an issue this Court declined to address in *Hood II*. Accordingly, it is appropriate to address the historical underpinnings of that larger issue. Nonetheless, even on the narrower issue of preferences, contemporaries well understood that bankruptcy process limited the ability of debtors to prefer one creditor over another.

The Court of Appeals based its decision in *Hood I* in large part on the original plan of the Constitution, the framers' understanding of bankruptcy law and policy, and the ratification debates in the states. The Court of Appeals was correct, although for historical reasons only lightly touched upon in its opinion.

Contrary to petitioners' argument, there is no evidence that at the time of the ratification of the Constitution the states reserved any right to assert sovereign immunity in any bankruptcy proceedings established pursuant to any Congressional exercise of the bankruptcy power conferred in art. I, § 8, cl. 4. None of the known public or private discussions of bankruptcy—before, during, or after the adoption and ratification of the Constitution—drew any distinction between public and private creditors. Any such distinction would have undermined the concept of a "fresh start," which was generally understood even then to be the fundamental purpose of the bankruptcy discharge.

Petitioners assert that the bankruptcy clause "effectively was ignored in both the Constitutional

Convention and the subsequent struggle for ratification." Petitioners' Brief, p. 40. This mistakes common understanding for unimportance. The historical record—the economic and financial issues that informed the Bankruptcy Clause, the ratification debates, and the subsequent Congressional debates on proposed bankruptcy legislation, including the bill that became the Bankruptcy Act of 1800—demonstrates that the federal bankruptcy power was intended by the framers and understood by their contemporaries to bind all creditors. These understandings rested on the states' surrender of their sovereignty in bankruptcy matters through the adoption and ratification of the Constitution. Both proponents and opponents of federal bankruptcy legislation recognized that the federal bankruptcy power necessarily entailed a concomitant abrogation of state sovereignty by binding states to discharges and by otherwise interfering with state sovereignty.

ARGUMENT

I. PETITIONERS AND THE *AMICI CURIAE* THAT SUPPORT THEM MISUNDERSTAND THE HISTORY OF BANKRUPTCY.

Petitioners and *amici curiae* in their support assert that the comparative lack of attention given the Bankruptcy Clause at the Constitutional Convention "confirms that the scope of Bankruptcy Clause power is narrow,'" Petitioners' Brief, p. 40, "an interpretation confirmed by the historical record," *id.*, p. 33. On the contrary, the contemporary understanding of bankruptcy was quite expansive: it embraced both the "fresh start" of the discharge and a large measure of voluntariness—that is, a choice by the debtor.

The first published argument for outright bankruptcy discharges in the American colonies appeared in an anonymously-written pamphlet in 1755. *See* [N.N.], *Some*

Reflections on the Law of Bankruptcy: Wrote at the Desire of a Friend: Shewing, That such a Law would be beneficial to the Publick, and analogous to Reason and our Holy Religion (1755). The author explicitly recognized the value of providing insolvent debtors with a fresh start, lamenting that "[m]en who prove insolvent, are commonly branded as villains." *Id.* at 4. While some insolvent debtors deserved the label, he observed that "a great many" were "Men of Probity and Honour" whose ruin stemmed from nothing more sinister than their "not being sufficiently instructed in the Nature of Trade." *Id.*

Imprisoning those debtors served no purpose other than to disgrace and demoralize them. Releasing them from jail without addressing their debts did no better. The insolvent debtor freed from jail by the poor debtor's oath,[4] which did not provide a discharge, remains "so sunk with the Weight of his Debts, he has no Heart to contrive or work for his relief," and so will do nothing. *Id.* at 5. He imagines "that he is Nothing but a Slave to his Creditors; that he is like never to possess any Thing for himself or Family, and so the remaining Part of Life is lost (and worse than lost) to himself, his Creditors, and to the Publick." *Id.*

If, however, an insolvent debtor could "deliver up his Effects to his Creditors, and *begin the World anew*, he might be encouraged to Frugality and Industry, and do every Thing in his Power to make an Interest for himself, as every Thing that he should then acquire would be his own." *Id.* (emphasis added). For that reason and others, N.N. argued

---

[4] Indigent debtors, those whose debts were small and their assets even less and who had been in jail for thirty days, could swear to those facts and be released. *See* Bruce H. Mann, *Republic of Debtors: Bankruptcy in the Age of American Independence* 50-51 (2002) ("Mann").

that a bankruptcy act was "consistent with Reason, and agreeable to the Genius of our holy Religion." *Id.* at 7.

In the eight years after N.N. wrote, four colonies enacted bankruptcy laws with discharges. Three statutes—in Massachusetts, Rhode Island, and Connecticut—were voluntary. Only New York passed an involuntary act. Three—Rhode Island, Connecticut, and New York—applied to noncommercial as well as commercial debtors. Only the Massachusetts act was limited to commercial debtors. *See* Mann at 59-65. New York, Connecticut, and Rhode Island also permitted debtors to petition the colony legislature for bankruptcy discharges. *See id.* at 62-63, 72-77. After the Revolution, but before the Constitutional Convention, Pennsylvania and New York enacted bankruptcy laws that included discharges. Pennsylvania's was nominally involuntary and limited to commercial debtors. New York's was voluntary and applied to both commercial and noncommercial debtors. *See id.* at 177-79.

Creditors and debtors alike understood that the purpose of the discharge was to provide the debtor with a fresh start. As Clement Biddle, a Philadelphia broker, wrote, "Most of my principal Creditors advised me to suffer a Commission of Bankruptcy to issue against Me to Close my old affairs so as to be able to proceed with more security ... in my present Business." Clement Biddle to Richard Smith (Apr. 25, 1789), Clement Biddle Letterbook, 1789-1792, Historical Society of Pennsylvania, Philadelphia; *see* Mann at 179.

Against this background, it is clear that the framers recognized that personal discharge and a fresh start were fundamental to bankruptcy law and therefore understood them to be an integral part of "uniform Laws on the subject of Bankruptcies." At least one delegate to the Constitutional Convention knew this to be the case first-hand: Jared

Ingersoll had argued before a state court in 1787 that failure to recognize an out-of-state bankruptcy discharge—and perforce the fresh start of the discharge itself—would mean that "perpetual imprisonment must be the lot of every man who fails; and all hope of retrieving his losses by honest and industrious pursuits, will be cut off from the intemperate bankrupt." *Millar v. Hall*, 1 U.S. (1 Dall.) 229, 230 (Pa. 1788); *see* Mann at 184-85; *see infra* at 17. Moreover, this remained the understanding of the members of Congress who drafted the first national bankruptcy legislation.

As Congress took up bankruptcy bills in the 1790s, no one disputed that commercial creditors and commercial debtors alike wanted a federal bankruptcy system that would sort out claims, distribute assets, and provide a discharge.[5] Robert Goodloe Harper of South Carolina, a leading Congressional proponent of bankruptcy, said in 1798 that a bankruptcy system "is greatly desired by the mercantile part of the community" and would have "beneficial effects in the support of mercantile credit, the prevention of fraud, the restraint of imprudent and destructive speculation, and the relief of honest industry, reduced to distress by the vicissitudes of trade." 5th Cong., 2d sess. (Jan. 3, 1798), 7 *The Debates and Proceedings in the Congress of the United States* 796-97 ("*Annals of Congress*").

Congressman James A. Bayard of Delaware, the most vigorous advocate of a bankruptcy law, made essentially the same point a year later when he stated that "[t]he principle of a bankrupt law ... is peculiarly applicable to merchants, and is manifestly calculated for the benefit of both debtor and

---

[5] Petitioners assert that "after the adoption of the Constitution, Congress almost completely ignored the Bankruptcy Clause power." Petitioners' Brief, p. 41. On the contrary, proposals for "uniform Laws on the subject of Bankruptcies" arose in every Congress from the First through the Sixth. *See* Mann at 187.

creditor." 5th Cong., 3d sess. (Jan. 15, 1799), 9 *Annals of Congress* 2657. He embraced the importance of the fresh start to bankruptcy by arguing that it was "reasonable" that a debtor's creditors "should accept of his property equally among them and have him at liberty *to begin the world anew*, as such a treatment will inspire a man with activity in making a future provision for himself and family; but if a person in such a situation is told that any exertions which he may make shall not go to the benefit of himself or to his family, but to his creditors, all his hopes are blasted, and he has no motive for industry or frugality, and he is lost to himself and the world." *Id.* (emphasis added).

It is commonly claimed, albeit erroneously, that English law, which could only be invoked by creditors, was the sole governing model for the Bankruptcy Act of 1800 and that, therefore, the plan of the Convention could not have included a surrender of the states' immunity from suit by insolvent debtors because there were no voluntary proceedings. Such claims make the common mistake of looking only at the language of the Act and not at the practice under it. *See* Petitioners' Brief, p. 35 n.43. They also ignore the several colonial and state bankruptcy statutes that permitted voluntary petitions by debtors. *See supra* at 6. It is true that the language of the Act of 1800 differed little from the various statutes that comprised English bankruptcy law. In application, however, the two differed sharply. Although in form involuntary, in substance the Act of 1800 was frequently wielded voluntarily by debtors. A comprehensive examination of all of the extant filings under the Act reveals numerous collusive or cooperative filings, the result of insolvent debtors enlisting sympathetic creditors—often family members—to sue out commissions of bankruptcy against them. *See* Mann at 228-39; *see also infra* at VI.

The immediacy with which debtors, creditors, and their lawyers recognized the voluntary potential of the process, together with the assertions of the drafters that the Act was necessary to protect entrepreneurial debtors, strongly indicate that the latent voluntarism of the process was deliberate. Upon learning of the adoption of the Act, debtors imprisoned in New York were so excited by "the prospect of returning to the world" that they celebrated by toasting "[t]he Bankrupt Law, this Godlike act," which presumably they would not have done had they thought its benefits uncertain or attainable only at the whim of hostile creditors. *See Forlorn Hope* (New York), Apr. 7 and 19, 1800.

Shortly before the Act went into effect, an anonymous interlocutor submitted thirty-six questions about the Act to five of the most prominent lawyers in New York—Aaron Burr, Robert Troup, Richard Harison, Brockholst Livingston, and Cornelius S. Bogert—all of whom treated the Act as an American original that did not require citation to English law, in which all were well-versed, to explain. While Burr made only a cursory reply, the other four gave thoughtful, concise answers to each question. *See* Opinions, Questions, and Answers on the Bankruptcy Act, May 27, 31, 1800, *The Papers of Aaron Burr, 1736-1836*, ser. I, reel 4, frames 656-83 (Mary-Jo Kline ed., microfilm ed., 1977).

All four explicitly described the steps that debtors who had already failed should take to qualify themselves for inclusion under the Act, since the acts of trading and acts of bankruptcy required by the new law had to occur after the effective date of the Act. *See id.* at frames 656-59, 661-62. They did not regard their responses as merely hypothetical. Five months later, Troup counseled a client how to make a voluntary proceeding appear involuntary. *See* "Memorandum for Mr. [Nicholas] Low respecting

Mr. [Jacob] Halletts bankruptcy" (Oct. 18, 1800), Robert Troup Papers, box 2, folder 1, New York Public Library, New York. Harison later gave detailed advice on how to initiate a "friendly" bankruptcy for an upstate merchant. *See* "Draft opinion on Case of Mr. [Jacob] Cuyler" (May 11, 1802), Richard Harison Papers, box 4, New-York Historical Society, New York.

Troup and Harison each served as commissioners of bankruptcy under the Act and so advised with particular authority. *See* Mann at 225, 233-34. In advising their clients how to turn the formally involuntary Act of 1800 into a *de facto* voluntary Act, Troup and Harison were simply acting on a widespread understanding of bankruptcy as a process that was available to debtors on a voluntary basis, both *de jure* in states that permitted voluntary petitions and *de facto* in states that did not.

On the narrower question of preferences, contemporaries well understood that a major advantage of bankruptcy process was that it limited the ability of debtors to prefer one creditor over another. A pervasive problem in the increasingly commercial colonial economies of the eighteenth century was that, compared to local creditors, distant creditors worked with imperfect information, compounded by the slowness with which it traveled. News of a debtor's decline reached faraway creditors after nearer creditors had already had an opportunity to act on the same information, which they would do by persuading the debtor to secure the debt or by serving attachment process on the debtor and securing for themselves a place of priority in the queue. *See* Mann at 47-49.

The statutory oaths that several colonies required of insolvent debtors for release from jail acknowledged this problem by including, as New York did, the affirmation that the debtor had not "at any time Since my imprisonment or

before Directly or indirectly, Sold, leased, assigned or otherwise disposed or made over in trust for my Self or otherwise … any part of my lands, estate, Goods Stock Money Debts or other real and personal estate, whereby to have or expect any benefit or profit to my Self or to Defraud any of my Creditors"—language that could encompass fraudulent conveyances and preferences. "An Act for the relief of Insolvent Debtors within the Colony of New York with respect to the imprisonment of their persons," 2 *The Colonial Laws of New York from the Year 1664 to the Revolution*, at 670 (1894).

William Samuel Johnson, a member of the Connecticut delegation to the Constitutional Convention, also recognized the problem. As a creditor's lawyer before the Revolution, he ignored a client's instructions to try to negotiate security for a debt and instead gave writs of attachment to an officer to be served on the debtor when he discovered that another creditor had given his own writs to the same officer to serve on the same debtor. Johnson explained to his client that he had done so to place his client "on the same footing with" the competing creditor rather than suffering "while a less favorable creditor is secured." William Samuel Johnson to James McEvers, Oct. 23, 1764, William Samuel Johnson Papers, Letterbook 12, Connecticut Historical Society, Hartford, Connecticut.

II. WIDESPREAD BUSINESS FAILURES AND INCREASING PRIVATE DEBT PROMPTED COLONIES IN THE 1750s AND STATES IN THE 1780s TO EXPERIMENT WITH BANKRUPTCY LEGISLATION.

The framers' understanding of both debt and bankruptcy had deep roots. Issues of debt—both public and private—loomed large in the 1780s. The American Revolution was fought on credit in the form of direct loans

and, more importantly, of paper currency and scrip issued by the Continental Congress and state governments. Congress and the individual states issued bills of credit and loan certificates of various kinds to purchase supplies and pay soldiers on the promise to pay interest on them or to redeem them in the future in specie or, more commonly, by accepting them in payment of tax obligations.

Massive emissions of new currency were required to sustain the war effort, thereby precipitating a sharp decline in the value of the currency in circulation. Depreciation was aggravated by inflation as large-scale government purchases drove prices upward, prompting Congress to print even more currency. By the end of the war, Congress had issued some $200 million in continental currency, which had fallen in value from near par to less than a hundredth of the value of specie. The states had emitted a similar amount, with similar results. *See* Mann at 169-70; *see generally* E. James Ferguson, *The Power of the Purse: A History of American Public Finance, 1776-1790* (1961).

Private debts were only slightly less daunting. The war had disrupted foreign trade, which was the linchpin of the entire economy. Peace did not undo the disruption. The American economy contracted steadily throughout the 1780s as exports fell, imports grew, and income and wealth declined. The decline of prices, the scarcity of cash, depreciation, competition from British manufactures, the obstacles to establishing export markets when no longer part of the British empire, and efforts by British commercial creditors to collect pre-war debts, all contributed to a wave of business failures after the American Revolution. *See* Mann at 170-71; *see generally* John J. McCusker and Russell R. Menard, *The Economy of British America, 1607-1789, with Supplementary Bibliography* (1991).

The instability of paper currency in the 1780s generated three responses that influenced the debate over bankruptcy legislation in the following decade. The most immediate response was proposals to charter banks, which could issue bank notes as a form of private currency that would be backed by something more substantial than the traditional hope-and-a-prayer of government issues. The second response, corollary to the first, was the enactment of state tender laws, which required creditors to accept paper currency at face value in payment of debts, without regard to the actual depreciated value of the currency. The third response was the rapid spread of speculation in every kind of government issue that contemplated future redemption, whether land warrants or debt certificates. Within just a few years, most of the state and national public debt was held by speculator-investors who had bought warrants, certificates, and indents from the original holders at steeply discounted prices. As prospects for a stronger national government increased with the announcement of the Constitutional Convention, so, too, did speculation in the public debt. *See* Mann at 172-76.

The sharp rise in private debt and the spread of business failures after the Revolution directly influenced the debate over bankruptcy legislation. Even before the Revolution, the growing geographic complexity of credit created by trading networks and the assignment of debt obligations had planted the idea that an insolvent debtor's assets rightfully belonged to all of the debtor's creditors rather than to the creditor quickest to seize them. *See id.* at 47-53. The economic dislocations of the Seven Years' War in the 1750s and 1760s had reinforced this idea by demonstrating that economic failure need not imply moral failure, thereby sweeping aside the principal objection to discharging debts. Indeed, the impact of war-time economic risk helped redefine insolvency from a moral delict to an economic one. Between 1755 and 1763, four colonies

enacted bankruptcy systems that distributed insolvent debtors' assets among their creditors and discharged them from further liability on their debts. *See id.* at 53-55. The economic consequences of the Revolution and its aftermath taught the same lessons twenty years later on an even larger scale. *See id.* at 53-61, 82-83, 102.

Debtors and creditors alike in the eighteenth century appreciated the value of bankruptcy process. Every colony, and later every state, permitted imprisonment for debt. *See id.* at 79. Without statutory mechanisms for apportioning a debtor's property, priority among unsecured creditors was determined by order of suit. Imprisoned debtors could not purchase their freedom simply by paying the first arresting creditor and ignoring the rest. Colonies and, later, states sporadically experimented with insolvency statutes that released those with small and middling debts from jail and apportioned their assets among their creditors but did not discharge them from liability. Experiments with true bankruptcy discharges were even more limited. *See id.* at 44-67. Large-scale insolvent debtors had little choice other than avoiding arrest or going to jail. The jails they went to were grim places where debtors, unlike criminal prisoners, had to provide their own food, fuel, and clothing—whether supplied from their own resources, the generosity of family or friends, begging, or the beneficence of local relief societies—or they did without. *See id.* at 78-108.

Not surprisingly, calls to abolish imprisonment for debt went hand in hand with proposals to enact bankruptcy legislation. From the first published argument for bankruptcy discharges in 1755,[6] bankruptcy was promoted as

---

[6] [N.N.], *Some Reflections on the Law of Bankruptcy: Wrote at the Desire of a Friend: Shewing, That such a Law would be beneficial to the Publick, and analogous to Reason and our Holy Religion* (1755).

a benefit for creditors as well as for debtors. It would allow creditors to intervene and preserve the debtor's assets for all creditors, and the availability of discharge would induce debtors not to waste their assets in futile efforts to avoid debtors' prison. Merchants in particular demanded bankruptcy legislation because they understood that commercial creditors were themselves debtors and saw the value of asserting mercantile control over business failures.

Thus, the bankruptcy statute enacted by Pennsylvania in 1785 in response to the post-war rise in business failures announced its commercial purpose in the preamble: a bankruptcy law was "necessary and proper as well as conformable to the usage of commercial nations." "An Act for the Regulation of Bankruptcy," 12 *The Statutes at Large of Pennsylvania from 1682 to 1801*, at 70 (James T. Mitchell and Henry Flanders comps., 1906).[7] Indeed, proceedings under the Pennsylvania statute often began only after commercial creditors had met and agreed to file a petition against the debtor. *See* Mann at 177-79.

The debt-related issues that dominated the 1780s thus included widespread private and public indebtedness, a fragile economy, unstable currency, mounting business failures, and the constant prospect of imprisonment for debt. Calls for bankruptcy legislation were one response; armed resistance, such as Shays's Rebellion and other violent episodes,[8] was another. This was the context for the Bankruptcy Clause of Article I, Section 8 of the Constitution.

---

[7] During the same period, New York enacted several limited, short-lived, and often-confusing bankruptcy statutes. *See* 2 *The Law Practice of Alexander Hamilton: Documents and Commentary* 332-36 (Julius Goebel, Jr., and Joseph H. Smith, eds., 1969); *see also* Mann at 179-80.

[8] *See In Debt to Shays: The Bicentennial of an Agrarian Rebellion* (Robert A. Gross ed., 1989).

III. DELEGATES TO THE CONSTITUTIONAL CONVENTION RECOGNIZED THE IMPORTANCE OF A UNIFORM LAW OF BANKRUPTCY THAT APPLIED TO ALL DEBTORS AND CREDITORS.

Bankruptcy first arose at the Constitutional Convention in a brief exchange over the full faith and credit clause. The Articles of Confederation had required the states to give full faith and credit to each other's judicial decisions. The Committee of Detail proposed enlarging this to include acts of the state legislatures. James Wilson of Pennsylvania and William Samuel Johnson of Connecticut explained that just as court judgments in one state should be accepted as the bases for legal proceedings in others, so, too, should the acts of each state's legislature, expressly naming those "for the sake of Acts of insolvency." Upon which Charles Pinckney of South Carolina moved to commit the provision to the committee, with the additional proposition "To establish uniform laws upon the subject of bankruptcies, and respecting the damages on the protest of foreign bills of exchange." 2 *The Records of the Federal Convention of 1787* at 447-48 (Max Farrand ed., 1937). When the matter returned to the floor of the Convention five days later, the expanded full faith and credit clause and the newly-created bankruptcy clause were voted on one after the other, although the final draft of the Constitution placed them in widely separated articles. *Id.* at 488-89; *see infra* at 21 & n.10.

The early close association between the full faith and credit clause and the bankruptcy clause is significant. By effectively binding each state to the judicial determinations of every other state, the full faith and credit clause necessarily invaded the sovereignty of each state in the same way that state subordination to a federal bankruptcy discharge would.

As Wilson and Johnson made clear, insolvency drove the extension of full faith and credit to acts of the legislatures. Alone among the states that had some form of insolvency process, Johnson's state, Connecticut, granted insolvency relief by legislative act rather than judicial decree. Although the Connecticut assembly was sparing in its grants of relief, many of the petitioners were merchants and traders who, if granted an act of insolvency or the lesser boon of temporary freedom from arrest, could travel to meet with their creditors in neighboring states and do business there if those legislative acts conferred extraterritorial protection. *See* Mann at 183. For its part, Pennsylvania, Wilson's state, had already dealt with issues of comity in insolvency in a case that decided the question of whether a debtor who had been released from jail in New Jersey under that state's insolvency act could plead the New Jersey discharge from jail to set aside a judgment entered against him by a Pennsylvania court for the same debt.

Lawyers for the debtor, Andrew Allen, argued that the full faith and credit clause of the Articles of Confederation meant that the New Jersey discharge "may be carried about by the Defendant into each of those states, as an impenetrable suit of armour to guard him from all future attacks upon his liberty, for a cause of action existing at the time it was granted." *James et al. v. Allen*, 1 U.S. (1 Dall.) 188, 190 (Pa. C.P. Phila. Co. 1786). The creditors' lawyers—one of whom, Jared Ingersoll, later served with Wilson in the Pennsylvania delegation to the Constitutional Convention—replied that the New Jersey discharge was "entirely a municipal regulation," merely "a local order confined to a limited district," which only released Allen from the Essex County jail and shielded him from further arrest in New Jersey but did not determine the underlying

debt or how Pennsylvania could proceed. *Id.*[9] The creditors' lawyers further argued that "[t]he articles of conf[ederation] require full faith to be given ...; but they do not introduce the Laws of one State into another state; they do not enable a P[laintiff] to issue an exe[cution] in one State for a judgment obtained in another." "James & Carsen v. Andrew Allan," in Peter Stephen DuPonceau, Precedent Book, 1785-1798, at 149, 157, Peter Stephen DuPonceau Papers, Historical Society of Pennsylvania, Philadelphia.

The presiding judge of the court of common pleas for Philadelphia County agreed. If the New Jersey order had discharged the underlying debt, he stated, full faith and credit might have required Pennsylvania to follow suit, but an order discharging a debtor from jail in one state did not discharge him from a different jail in a different state. In a passage with which Wilson surely would have been familiar, and Ingersoll clearly was, the judge wrote that "[i]nsolvent laws subsist in every State in the Union, and are probably all different from each other; ... and they have never been considered as binding out of the limits of the State that made them." *James et al. v. Allen*, 1 U.S. (1 Dall.) at 191; *see* Mann at 183-84. Only a federal bankruptcy power could redress this weakness, and only if a bankruptcy discharge bound all creditors wherever located.

While the delegates were meeting in Philadelphia, Ingersoll was preparing to argue—or perhaps had recently argued, the precise timing is uncertain—a case that squarely raised the issue of what effect a full bankruptcy discharge in one state should have in another. For a brief period in 1787,

[9] The phrase "a local order confined to a limited district" appears not in the published report but in a slightly fuller manuscript version of the arguments in "James & Carsen v. Andrew Allan," in Peter Stephen DuPonceau, Precedent Book, 1785-1798, at 149, 156-57, Peter Stephen DuPonceau Papers, Historical Society of Pennsylvania, Philadelphia.

Maryland had a bankruptcy statute. A debtor, one Hall, a resident of Maryland, had received a discharge under the statute. His creditor, one Millar, who lived in Philadelphia, had not seen the notice of Hall's intent to seek the benefit of the act, which had been published as the statute required in the *Maryland Gazette*, nor had Hall listed Millar as a creditor in his schedule of debts. When Hall next set foot in Pennsylvania, Millar had him arrested for the unpaid debt. Ingersoll, representing Hall before the Pennsylvania Supreme Court, argued that the full faith and credit clause of the Articles of Confederation required Pennsylvania to recognize the Maryland discharge. He also contended that the same result was compelled "from general principles; ... from the reason of the thing, and from the mischievous consequences of a contrary position," because without a universally-recognized discharge "perpetual imprisonment must be the lot of every man who fails; and all hope of retrieving his losses by honest and industrious pursuits, will be cut off from the intemperate bankrupt." *Millar v. Hall*, 1 U.S. (1 Dall. at 230).

This last argument was the one on which Chief Justice Thomas McKean based his ruling for the debtor. *See* Mann at 184-85. It was an argument that justified a uniform law of bankruptcy binding on all creditors and debtors. It was also an argument that recognized that one purpose of a bankruptcy discharge was to provide the debtor with a fresh start, unburdened by continuing liability to any of his creditors. And it was an argument made by a delegate to the Convention while the Convention was weighing the bankruptcy clause.

IV. IN THE RATIFICATION DEBATES, FEDERALISTS AND ANTIFEDERALISTS ALIKE UNDERSTOOD THAT THE FEDERAL BANKRUPTCY POWER ENTAILED AN ABROGATION OF STATE SOVEREIGNTY BY BINDING STATES TO DISCHARGES.

The idea that bankruptcy raised issues that were better addressed on a national level rather than through mechanisms of interstate comity thus took root during the Constitutional Convention. The lawyers and judges in the two Pennsylvania cases, and, through them, key delegates to the Convention, clearly recognized the problems inherent in applying varying state insolvency and bankruptcy rules to debtors and creditors who lived in different states. Credit, like commerce, could not be contained within state boundaries. Full faith and credit helped somewhat, but it could harm out-of-state creditors by imposing on them state bankruptcy discharges that stripped them of the debts owed them without their participation in the process. As Wilson remarked at the Pennsylvania ratifying convention, "Merchants of eminence will tell you that they can trust their correspondents without law; but they cannot trust the laws of the state in which their correspondents live." Proceedings and Debates of the Convention, Dec. 7, 1787, 2 *The Documentary History of the Ratification of the Constitution* 519 (Merrill Jensen *et al.*, eds., 1976) ("*Documentary History*").

Federal "uniform Laws on the subject of Bankruptcies," which subjected debtors and creditors to the same rules and procedures regardless of where they lived, would be more consonant with the interstate nature of commerce and the credit relations on which commerce rested. James Madison recognized this in the single mention of the bankruptcy clause in *The Federalist*, when he wrote that the "power of establishing uniform laws of bankruptcy,

is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different States, that the expediency of it seems not likely to be drawn into question." *The Federalist* No. 42 at 287 (James Madison) (Jacob E. Cooke ed., 1961).[10] So did Samuel Holden Parson, a delegate to the Connecticut ratifying convention, when he explained that "[t]he general laws of bankruptcy appear to be necessary both for creditors and debtors, and it appears reasonable, when conformed to in one state, they should be effectual to secure the debtor throughout the union," which could only be accomplished by a uniform federal law. Parson to William Cushing, Jan. 11, 1788, 3 *Documentary History* 572.[11]

None of the discussions of bankruptcy before, during, or after the ratification debates drew any distinction between public and private creditors. All the available evidence suggests that Antifederalist opponents of the Constitution believed that the proposed federal bankruptcy power recognized no such distinction. The anonymous "Federal Farmer," for example, argued that a federal bankruptcy power was an interference "with the internal police of the separate states, especially with their administering justice

---

[10] Madison discussed the full faith and credit clause in the very next paragraph, thus maintaining the juxtaposition of the clauses at the Convention despite their separation in the Constitution he was defending.

[11] Petitioners state that "the Bankruptcy Clause power was not mentioned in the States' Ratification Debates." Petitioners' Brief at 41. Parson's letter indicates this statement is incorrect.

among their own citizens."[12] Such a power threatened to extend the reach of the federal judiciary—always a concern of the Antifederalists—by drawing "almost all civil causes" into the federal courts. This interference "with the internal police of the separate states" would necessarily entail a concomitant abrogation of state sovereignty by binding states to federal bankruptcy proceedings. The "danger" perceived by the Antifederalists was the very benefit intended by the framers. Because of the ratification debates, that would have been the understanding of the federal bankruptcy power as ratified by the people.

V. THOMAS JEFFERSON OPPOSED THE FEDERAL BANKRUPTCY POWER AS AN INVASION OF STATE AUTHORITY.

Thomas Jefferson recognized the extraordinary federal powers contemplated by bankruptcy laws proposed pursuant to the Bankruptcy Clause.[13] He was no less aware of the extent to which those powers curtailed state sovereignty. Upon reading the bankruptcy bill that was before Congress in 1792, he outlined his objections to provisions that later were enacted in the Bankruptcy Act of 1800 and sent them to James Madison. The bill in question had been prompted in part by a petition from 148 South

---

[12] *An Additional Number of Letters From the Federal Farmer to the Republican Leading to a Fair Examination of the System of Government Proposed by the Late Convention; To Several Essential and Necessary Alterations in It; And Calculated to Illustrate and Support the Principles And Positions Laid Down in the Preceding Letters* (1788), 2 Herbert J. Storing ed., *The Complete Anti-Federalist* 214, at 344 (1981).

[13] "It is appropriate to consult not only *The Federalist*, but also the 'writings of other intelligent and informed people of the time' that 'display how the text of the Constitution was originally understood.'" Petitioners' Brief, p. 46, n.50, quoting Antonin Scalia, *A Matter of Interpretation: Federal Courts & the Law* 38 (1997).

Carolina merchants and traders—creditors as well as debtors—praying for a bankruptcy law. *See* Mann at 196. Jefferson objected that the bill would invoke federal intervention too readily by treating any move across state lines as an act of bankruptcy, which would enable a creditor to petition his debtor into bankruptcy even though the debtor remained subject to state debt-collection process under the full faith and credit clause. Jefferson also objected to the proposal to give federal bankruptcy commissioners the authority to "enter houses, break open doors, chests, etc." to arrest bankrupt debtors—a power denied to state officers executing state process. *See* "Extempore thoughts and doubts on very superficially running over the bankruptcy bill" (Dec. 10, 1792), 24 *The Papers of Thomas Jefferson* 722-23 (Julian P. Boyd *et al.* eds., 1990).[14]

These reservations paled beside what Jefferson saw as the most threatening part of the bill—that it permitted the land of bankrupt debtors to be seized and sold under federal law in direct contravention of state laws that shielded land from execution process. Jefferson explicitly cast the issue as one of federal trespass on state prerogative: "Is not this a fundamental question between the general and state legislatures?" *Id.* at 722-23. To John Francis Mercer he wrote that the bankruptcy bill "assumes the right of Seizing and selling lands, and so cuts the knotty question of the Constitution whether the general government may direct the transmission of land by discent [sic] or otherwise." Jefferson to John Francis Mercer (Dec. 19, 1792), *id.* at 758. To Thomas Mann Randolph, Jr., he complained about the bill that "[h]itherto we had imagined the general government

---

[14] Jefferson sent the "loose thoughts" to James Madison. *See* Jefferson to Madison [ca. Dec. 10, 1792], 24 *Papers of Thomas Jefferson* 717. The extraordinary arrest power became law in the Bankruptcy Act of 1800, "An Act to establish an uniform system of Bankruptcy throughout the United States," 2 Stat. ch. 19, § 4.

could not meddle with the title to lands." Jefferson to Thomas Mann Randolph, Jr. (Dec. 21, 1792), *id.* at 775. Jefferson clearly saw that the federal bankruptcy power entailed a circumscription of state authority beyond that implied by the concept of mere geographic uniformity alone.

VI. THE BANKRUPTCY ACT OF 1800 STRENGTHENED NATIONAL AUTHORITY AT THE EXPENSE OF THE STATES.

The Bankruptcy Act of 1800 passed by the Sixth Congress was virtually identical to the bankruptcy bills considered by the five preceding Congresses.[15] It therefore embodied an understanding of the nature and extent of the federal bankruptcy power and its relationship to state sovereignty that was unchanged from the ratification of the Constitution. Although the Act passed the House of Representatives only on the tie-breaking vote of the Speaker, the only difference of opinion between proponents and opponents of the bill was whether the nation required a bankruptcy system at all. No one in any of the extensive floor debates on the bill across several sessions of Congress questioned that Congress had the authority under the Bankruptcy Clause to override state laws on the seizure of land or on the arrest and imprisonment of debtors. On the contrary, everyone recognized that a federal bankruptcy system would strengthen national authority at the expense of the states.

---

[15] The immediate impetus for the Act was the financial collapse of the Panic of 1797, when numerous prominent men—including an associate justice of this Court—found themselves imprisoned for debt or fugitives from their creditors. Their presence in the pool of insolvent debtors confounded the normal expectations of social and economic status and altered the political dimensions of debtor relief. *See* Mann at 202-05. A uniform federal bankruptcy law would not help these men if it did not override the very state process by which they had been imprisoned.

For example, when James A. Bayard of Delaware, a leading proponent of the bill, argued that a "great advantage of this law will be that it will generalize, by an uniform system through the United States, the most important law of any society—the law regulating the relation of debtor and creditor," he had in mind more than certainty and predictability of legal relations. 5th Cong., 3d sess. (Jan. 15, 1799), 9 *Annals of Congress* 2664. To Bayard, uniformity was a means, not an end. A uniform national bankruptcy law would "unite and naturalize the United States, and ... cement together the different parts of the Union and connect more closely the nation with the Federal Government." *Id.* This was why he regarded a bankruptcy act as "among the greatest national objects." *Id.*

Similarly, Theodore Sedgwick of Massachusetts believed that a bankruptcy law would promote the authority of the government "by submitting to it all the relations of creditor and Debtor, and the active agency of commercial interests and passions." More importantly, he said, "it will render it absolutely necessary to spread out the national judicial by a creation of new districts and Judges, and instituting the offices of justice or some thing similar to it." Sedgwick to Henry Van Schaack (Jan. 15, 1800), Theodore Sedgwick Papers, box 3, folder 1, Massachusetts Historical Society, Boston. As Bayard reported to his father-in-law, "The Antis have discovered that [the bankruptcy bill] will add strength to the federal compact, and they make every exertion to defeat it." Bayard to Richard Bassett (Feb. 1, 1800), Bayard Family Papers, Library of Congress, Washington, D.C.; *see generally* Mann at 208-14.

The ways in which the Bankruptcy Act of 1800 curtailed state sovereignty were clear and deliberately designed. As Sedgwick informed one correspondent, the bill would undermine the attachment laws common in New England. It would also subject land in Virginia to the

payment of debts in certain circumstances "and may form a precedent for the further extension of the principle" of levying on land in others. Sedgwick to Rufus King (Feb. 6, 1800), Copies of Letters from Theodore Sedgwick to Rufus King, Theodore Sedgwick Papers, box 9, vol. 10. In addition to giving federal bankruptcy commissioners arrest powers, denied by every state to its own officers, *see* 2 Stat. 19, § 4, the Act barred state attachment process, *id.* at § 13, superseded state arrest process, *id.* at § 22, authorized use of the writ of habeas corpus to free discharged debtors from jail, *id.* at § 38, and included real property in the debtor's estate to be distributed to creditors without regard to state statutes that barred seizure of unmortgaged land or that imposed other restrictions, such as valuation requirements designed to prevent distress sales at artificially low prices, *id.* at §§ 29, 30, 44, 59. Each of these provisions represented a significant restriction of state sovereignty. None of them encountered objections on Constitutional grounds.

This is not to say that the Act was uncontroversial.[16] The leading opposition newspaper, the Philadelphia *Aurora*, denounced the law as a Federalist plot to extend the power of the federal judiciary and create "a patronage of nearly 250 offices great and small." *Aurora, or General Advertiser* (Philadelphia), Mar. 18 and 29, 1800. Congressman Anthony New made the same charge to his constituents in Virginia, reporting that the law transfers to the federal courts "a great portion of the jurisdiction now held by the State

---

[16] Significant support for the Act came from urban commercial creditors, who hoped federal bankruptcy process would help sort out claims against and reach the assets of the large numbers of commercial debtors imprisoned in the wake of the collapse of speculation schemes in the Panic of 1797. The only real concern for debtors came from opponents of the Act, who feared that the Act, although limited to commercial debtors, would sweep in farmers and other landowners. *See generally* Mann at 198-220.

Courts, ... greatly increases Executive patronage, and may be made to extend to almost every description of citizens." He paired the bankruptcy act with the pending judiciary bill as examples of the Federalists' "favorite scheme of consolidation." Anthony New, Circular Letter (Apr. 8, 1800), 1 *Circular Letters of Congressmen to Their Constituents, 1789-1829* at 196 (Noble E. Cunningham, Jr., ed., 1978). Congressman John Fowler of Kentucky suspected that the law "will be little more than a machine for extending the influence of the executive administration" and "an instrument to injure the incautious agriculturalists." John Fowler, Circular Letter (May 15, 1800), *id.* at 209. None of the opponents argued that the Act was an unconstitutional impairment of state sovereignty. To the contrary, it was clear to both proponents and opponents of the Act that the states had already surrendered their sovereignty in bankruptcy matters through the adoption and ratification of the Constitution.

Chief Justice John Marshall, who as a member of Congress from Virginia had voted for the Bankruptcy Act of 1800, *see* 6th Cong., 1st sess. (Feb. 21, 1800), 10 *Annals of Congress* 534, acknowledged this surrender just five years later when he expressly rejected the argument that a "claim of priority on the part of the United States will ... interfere with the right of the state sovereignties respecting the dignity of debts" with the reply, "But this is an objection to the constitution itself. The mischief suggested, so far as it can readily happen, is the necessary consequence of the supremacy of the laws of the United States on all subjects to which the legislative power of congress extends." *United*

States v. Fisher, 6 U.S. 358, 396-97 (1805).[17] In this, unlike in so many other Constitutional matters, Marshall and Jefferson were agreed.

CONCLUSION

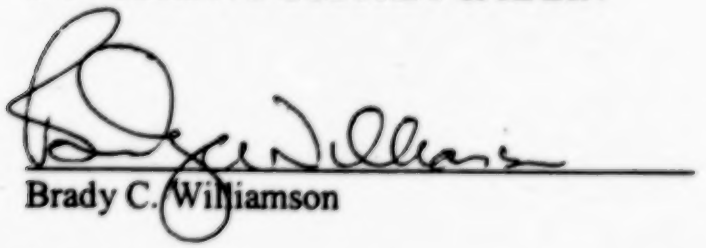
There is no evidence that at the time of the ratification of the Constitution the states reserved any right to assert sovereign immunity in bankruptcy proceedings established pursuant to Congressional exercise of the bankruptcy power conferred in art. I, § 8, cl. 4 of the Constitution. Any attempt to assert such a right now is contrary to the historical evidence. None of the known public or private discussions of bankruptcy before, during, or after the adoption and ratification of the Constitution drew any distinction between public and private creditors. The historical record demonstrates that the federal bankruptcy power was intended and understood to bind all creditors. The same record also indicates that proponents and opponents alike of federal bankruptcy legislation recognized that the federal bankruptcy power would entail a concomitant abrogation of state sovereignty by binding states to federal bankruptcy proceedings and otherwise interfering with state sovereignty.

[17] The defendants were the assignees of the bankruptcy estate of Peter Blight, a Philadelphia import merchant whose bankruptcy proceedings were unusually contentious. *See* "Peter Blight," Records of the U.S. District Court for the Eastern District of Pennsylvania, Bankruptcy Act of 1800, Record Group 21, National Archives—Mid-Atlantic Region, microfilm 993, reels 4-5; *see* Mann at 242-43.

Dated: August 22, 2005.

Respectfully submitted,

LA FOLLETTE GODFREY & KAHN

By: 

Brady C. Williamson

LaFollette Godfrey & Kahn
One East Main Street, Suite 500
P.O. Box 2719
Madison, WI 53701-2719

Attorneys for Bruce H. Mann

MN246092_1.DOC

No 04-885

Supreme Court, U.S.
FILED
AUG 22 2005
OFFICE OF THE CLERK

In The
Supreme Court of the United States

CENTRAL VIRGINIA COMMUNITY COLLEGE, *ET AL.*,

Petitioners,

v.

BERNARD KATZ, LIQUIDATING SUPERVISOR FOR WALLACE'S BOOKSTORES, INC.,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL ASSOCIATION OF BANKRUPTCY TRUSTEES *AMICUS CURIAE*, IN SUPPORT OF THE RESPONDENT

FILED BY CONSENT OF PARTIES

Martin P. Sheehan
Counsel of Record
41 Fifteenth Street
Wheeling, West Virginia 26003
(304) 232-1064

Counsel for Amicus Curiae
National Association of Bankruptcy Trustees

THE LEX GROUP • 1108 East Main Street • Suite 1400 • Richmond, VA 23219
(804) 644-4419 • (800) 856-4419 • Fax: (804) 644-3660 • www.thelexgroup.com

CONSENT TO FILING OF BRIEF

The petitioners and respondent filed blanket consents to the filing of amicus briefs.

QUESTION PRESENTED

Does Congress have authority to abrogate state sovereign immunity under the Bankruptcy Clause of the United States Constitution, Article I, Section 8, clause 4?

PARTIES TO THE LITIGATION

Petitioners are several state supported institutions of higher learning; Central Virginia Community College, Virginia Military Institute, New River Community College, and Blue Ridge Community College.

Bernard Katz is the liquidating supervisor of Wallace's Bookstores, Inc.

TABLE OF CONTENTS

CONSENT TO FILING OF BRIEF i

QUESTION PRESENTED ii

PARTIES TO THE LITIGATION iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES v

INTEREST OF THE AMICI CURIAE 1

OPINIONS AND ORDERS BELOW 2

STATEMENT OF JURISDICTION 2

CONSTITUTIONAL AND
STATUTORY PROVISIONS AT ISSUE 2

STATEMENT OF THE CASE 6

SUMMARY OF THE ARGUMENT 6

ARGUMENT 8

CONCLUSION 28

TABLE OF AUTHORITIES

SUPREME COURT CASES

Adair v. Bank of America National Trust and
Savings Association,
303 U.S. 350 (1938) 14

Alden v. Maine,
527 U.S. 706 (1999) 9, 10, 13, 24

Blanchette v.
Connecticut General Insurance Corps.,
419 U.S. 102 (1974) 14

Blatchford v. Native Village of Noatak,
501 U.S. 775 (1991) 24

California v. Deep Sea Research, Inc.,
523 U.S. 491 (1998) 17

Chisolm v. Georgia,
2 U.S. (2 Dall) 419 (1793) 12-13

City of New York v. Saper,
336 U.S. 328 (1949) 18, 19, 24

College Savings Bank v. Florida Prepaid Post-
Secondary Education Expense Bd.,
527 U.S. 666 (1999) 9, 10

Continental Illinois National Bank and Trust Co. v. Chicago, Rock Island and Pacific Railway, Co., 294 U.S. 648 (1935) 11, 14

Florida Prepaid Post-Secondary Education Expense Bd. v. College Savings Bank, 527 U.S. 627 (1999) 9, 10

Gardner v. New Jersey, 329 U.S. 565 (1945) 17, 19, 24

Hanover National Bank v. Moyses, 186 U.S. 181 (1902) 11, 14, 25

Hoffman v. Connecticut Department of Income Maintenance, 492 U.S. 96 (1989) 8, 27

Idaho v. Couer d'Alene Tribe of Idaho, 521 U.S. 261 (1997) 9

Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000) 9

Marshall v. New York, 254 U.S. 380 (1920) 16

New Jersey v. Anderson, 203 U.S. 483 (1906) 15, 18, 19, 24

New York v. Irving Trust Co., 288 U.S. 329 (1933) 16, 17, 18, 19

Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) 27

Perez v. Campbell, 402 U.S. 637 (1971) 18

Railway Labor Executives' Ass'n v. Gibbons, 455 U.S. 457 (1982) ..... passim

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) 9, 19, 27

Sturges v. Crowninshield, 12 U.S. (4 Wheat.) 122 (1819) 14

United States v. Nordic Village, Inc., 503 U.S. 30 (1992) 8

Tennessee Student Assistance Corp. v. Hood, 541 U.S. 509 (2004) 19, 25

Van Huffel v. Harkelrode, 284 U.S. 225 (1931) ..... passim

Wright v. Union Central Life Insurance Co., 304 U.S. 502 (1938) 11, 14

OTHER FEDERAL CASES

In re: Ambler, 1 F.Cas. 588 (D.C. S.D.N.Y. 1875)(No. 270) 23

In re: Greenville & C.R. Co.,
10 F.Cas.1180 (D.C. S.C. 1872)(No. 5,787) 15

McVey Trucking, Inc. v.
Sec'y of State of Illinois
(In re: McVey Trucking, Inc.),
812 F.2d 311, 328 (1987) 26

Parsons v. Greenville & C.R. Co.,
18 F.Cas. 1255 (C.C.A. E.D. S.C. 1877)
(No. 10,776) 15

In re: 245 Associates, L.L.C.,
188 B.R. 743 (Bankr. S.D. N.Y. 1995) 17

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XI ..... passim

U.S. Const. art. I, § 8, cl. 4,
The Bankruptcy Clause ..... passim

U.S. Const. art. I, § 10,
The Contract Clause 6, 10, 22

Commerce Clause 10, 27

Naturalization Clause 22

Patent Clause 10

STATUTES AND REGULATIONS

11 U.S.C. § 106 ..... 3, 8

11 U.S.C. § 106(a) 8

11 U.S.C. § 507(a)(3) 25

11 U.S.C. § 507(a)(5) 25

11 U.S.C. § 507(a)(8) 19, 25

11 U.S.C. § 523 ..... 3, 19

11 U.S.C. § 523(a)(8) 25

11 U.S.C. § 543 17

11 U.S.C. § 541 3

11 U.S.C. § 547(b) 3, 25

11 U.S.C. § 550(a) 5

11 U.S.C. § 727(a) and (b) 19

11 U.S.C. § 1322(a)(2) 19

11 U.S.C. § 1328 19

28 U.S.C. § 157(b)(2)(3) and (4) 27

28 U.S.C. § 586(a)(1) 1

28 U.S.C. § 1254(1) 2

Bankruptcy Rule of Procedure 7008(a) 27

Pub. L. No. 103-394, Sect. 113, 108 Stat. 4106 (1994) 8-9

Act of April 4, 1800, Ch. XIX, 2 Stat. 19 (1800),
repealed by Act of Dec. 19,
1803 Ch. 6, 2 Stat. 248 23

Section 5 of the Act, Ch. IX, 5 Stat. 440,
repealed by Act of March 3, 1843,
Ch. 82 5 Stat. 614 23

Section 27 of the Act of March 2 1867,
Ch. 176, 14 Stat. 517,
repealed by Act of June 7, 1878,
Ch. 160, 20 Stat. 99 23

MISCELLANEOUS

The Federalist No. 32 ..... 19, 22, 24

The Federalist No. 81 24

Black, H.C.,
A Treatise on the Law and Practice of Bankruptcy,
(4th Ed. Kansas City, Mo. 1926) 16

Browning, M.,
Tough Bankruptcy Issues Under the
Eleventh Amendment,
7 J. of Bankruptcy Law and Practice 219 (1998) 26

Klee, K. N., Johnston, J. O., Winston, E.,
State Defiance of Bankruptcy Law,
52 Vanderbilt L.Rev. 1527 (1999) 26

Lieb, R.,
Eleventh Amendment Immunity of a State in
Bankruptcy Cases: A New Jurisdictional Approach,
7 Am. Bank. Inst. L.Rev. 269 (1999) 26

INTEREST OF THE AMICUS CURIAE

The amicus curiae is the National Association of Bankruptcy Trustees, an organization[1] consisting of over 1000 of the Chapter 7 panel trustees, out of approximately 1220 such panel trustees. Panel trustees are appointed by the United States Trustees pursuant to 28 U.S.C. § 586(a)(1).

---

[1] No other person or entity, except for the *amicus curiae*, its members and its counsel, made a monetary contribution to the preparation and submission of this brief.

OPINIONS AND ORDERS BELOW

The Bankruptcy Court for the Eastern District of Kentucky denied petitioners' motions to dismiss an AP No. 03-5081. The District Court affirmed in an unpublished opinion on August 5, 2003. The United States Court of Appeals affirmed on August 4, 2004, in an unpublished decision.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on August 4, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(l).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

I. The Bankruptcy Clause of the Constitution, U. S. Const. art. I, § 8, cl. 4, grants the following power to Congress:

> To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States.

II. The Eleventh Amendments states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

III. Bankruptcy Code, 11 U.S.C. § 106 provides in pertinent part:

> (a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is aborgated as to a governmental unit to the extent set forth in this section with respect to the following:
>
> (1) Section []...547...of this title.

IV. Bankruptcy Code, 11 U.S.C. § 541 provides in pertinent part:

> (a) The commencement of a case…creates an estate. The estate is comprised of all the following property, wherever located and by whomever held: …
> …3)
> Any interest in property that the trustee recovers under section…550….

V. Bankruptcy Code , 11 U.S.C. § 547(b) provides in pertinent part:

(b) Except as provided in subsections (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property –

(1) to or for the benefit of a creditor.

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was solvent;

(4) made –

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if –

(A) the case were a case under Chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt

to the extent provided by the provisions of this title.

IV. Bankruptcy Code, 11 U.S.C. § 550(a) provides in –pertinent part

(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section…547… of this title, the trustee may recover, for the benefit of the estate , the property transferred, or, if the court so orders, the value of the property…

...

STATEMENT OF THE CASE

Several adversary proceedings were instituted to recover property of the bankruptcy estate. The recoveries were sought of property preferentially transferred to the petitioners. The petitioners have denied jurisdiction to collect from them under the Fleventh Amendment. Motions to dismiss were denied in Bankruptcy Court. That decision has been affirmed on appeal by the District Court and the Court of Appeals.

SUMMARY OF THE ARGUMENT

In several cases, this Court has held that the powers granted to Congress in Article I, Section 8 of the Constitution were insufficient to permit abrogation of state sovereign immunity. However, none of those cases have considered unique aspects -of the Bankruptcy power. The grant of power to establish "uniform laws on the subject of Bankruptcies" is linguistically distinct. Moreover, the power to impair contracts, a key power in the award of bankruptcy relief, has been ceded by the States in Article I, Section 10. Together, these provisions distinguish the Bankruptcy power from other powers given to Congress. These provisions support the conclusion that States ceded their immunity from suit as part of the plan of convention. If so ceded, the design of the Eleventh Amendment did not alter the original scheme to create immunity that had been ceded. Instead, the Eleventh Amendment restored the original scheme.

This Court has repeatedly found the laws in England and the colonies when the Constitution was established do not define the power given to Congress in the Bankruptcy Clause. Those laws provided only for involuntary liquidation of traders and merchants. Prior decisions of this Court have found constitutional (1) the grant of power bankruptcy relief to more persons and entities, (2) permitting relief to be voluntarily sought, and (3) allowing relief in the form of reorganization.

Prior to 1898, Congress only sporadically exercised the Bankruptcy power. Generally, Congress made no effort to grant relief to debtors against States, although, at times, State tax claims were subordinated to some other claimants in the distribution of assets. A single lower court decision from the nineteenth century where a State challenged jurisdiction because a State was a creditor upheld jurisdiction.

In the twentieth century, this Court has addressed claims of sovereignty in the bankruptcy context. On all of these occasions, this Court has held the Bankruptcy power was sufficient to interfere with a fundamental power of a sovereign State, the power to collect state taxes.

The repeated decisions that state tax collection may be altered by the Bankruptcy power suggests Congress has the ability to alter a debtor's relationship with a creditor-State. Because such a change must occur in a bankruptcy proceeding, the power to bind States in bankruptcy proceedings must also exist.

These conclusions are supported by the Framers. Hamilton's exposition of state sovereignty in tax matters in The Federalist admits of three exceptions. The Bankruptcy power qualifies for two of these exceptions. When Hamilton refers to this discussion again when discussing judicial power in The Federalist, he implies an impact on sovereign immunity as well.

There is compelling evidence of the surrender of immunity in the constitutional compact. Failure to continue to recognize that point would disrupt the current bankruptcy scheme which has been built in reliance on the prior decisions of this Court.

The Bankruptcy power is sufficiently unique that such a result would be consistent with this Court's Eleventh Amendment jurisprudence. The decision is capable of being confined to issues within the core jurisdiction of a bankruptcy court.

The *amicus curiae* ask the decision of the U.S. Court of Appeals for the Sixth Circuit be affirmed.

ARGUMENT

In 1994, in response to the decisions in Hoffman v. Connecticut Department of Income Maintenance, 492 U.S. 96 (1989) (Congress failed to clearly indicate its intention to abrogate state sovereign immunity in bankruptcy cases) and United States v. Nordic Village, Inc., 503 U.S. 30 (1992)(Congress failed to clearly indicate its intention to abrogate federal sovereign immunity), Congress enacted the current version of 11 U.S.C. § 106. See, Pub. L. No. 103-394, Sect. 113, 108 Stat. 4106, 4117 (1994). That provision specifically abrogates the sovereign immunity of all governmental entities.

Petitioners, deny Congress has the power to abrogate state sovereign immunity. They rely on Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), which held that the powers granted to Congress in the Indian Commerce Clause did not permit abrogation of state sovereign immunity. The Court concluded that States could not be required to litigate in a federal forum without consent. The majority declared that no power granted to Congress in Article I, section 8, permitted the abrogation of Eleventh Amendment immunity.

Since the decision in Seminole Tribe, the Court has extended this holding in several cases.[2] One of those cases, Alden v. Maine, 527 U.S. 706 (1999), held that a State could not be subjected to liability for damages under a federal statute even if the suit were brought in a state court. With that holding in mind, it appears that petitioners claim the functional ability as sovereign States to opt out of the bankruptcy scheme established by Congress. They contend that Congress lacked power to create a bankruptcy system that would require a State to litigate, without its consent, in a federal bankruptcy forum. Although not articulated by

---

[2] Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000); Florida Prepaid Post-Secondary Education Expense Bd. v. College Savings Bank, 527 U.S. 627 (1999); College Savings Bank v. Florida Prepaid Post-Secondary Education Expense Bd., 527 U.S. 666 (1999); Alden v. Maine, 527 U.S. 706 (1999); and Idaho v. Couer d'Alene Tribe of Idaho, 521 U.S. 261 (1997).

the petitioners, it should be recognized that efforts to effectively adjust a debtor's relationship with a creditor-State in a state forum would be problematic for a number of reasons, including the difficulties articulated in Alden.

Petitioners assert that the necessity for an exclusive federal system of laws is an insufficient justification for abrogation of the Eleventh Amendment. They rely on College Savings Bank v. Florida Prepaid Post-Secondary Education Expense Bd., 527 U.S. 666 (1999) (trademarks) and Florida Prepaid Post-secondary Education Expense Bd. v. College Savings Bank, 527 U.S. 627 (1999) (patents). Still, there are some linguistic differences among the Patent and Commerce Clauses considered there and the Bankruptcy Clause, at issue now, that alone might make these cases distinguishable from the instant case. More significantly, however, the Constitution also prohibits any State from effectively adjusting a debtor's relationship to his creditor by impairing a contractual obligation.

Not only does Article I, Section 8, clause 4 grant Congress the power to establish "uniform laws on the subject of bankruptcies," States also cede the power in Article I, Section 10, to "pass . . . any law impairing the obligation of contracts." This is one of the fundamental characteristics of a bankruptcy law. See, Railway Labor Executives' Ass'n v. Gibbons, 455 U.S. 457 (1982) (Rhenquist, J.)

> Although we have noted that "[t]he subject of bankruptcies is incapable of

> final definition," we have previously defined "bankruptcy" as the "subject of the relations between an insolvent or nonpaying or fraudulent debtor and his creditors, extending to his and their relief." Wright v. Union Central Life Ins. Co., 304 U.S. 502, 513 -514 (1938). See Continental Illinois National Bank & Trust Co. v. Chicago, R. I. & P. R. Co., 294 U.S. 648, 673 (1935). Congress' power under the Bankruptcy Clause "contemplate[s] an adjustment of a failing debtor's obligations." Ibid. This power "extends to all cases where the law causes to be distributed, the property of the debtor among his creditors. "Hanover National Bank v. Moyses, 186 U.S. 181, 186 (1902). It "includes the power to discharge the debtor from his contracts and legal liabilities, as well as to distribute his property. The grant to Congress involves the power to impair the obligation of contracts, and this the States were forbidden to do." Id., at 188.

Id. at 466.

Clearly, in giving the bankruptcy power to the federal government, States ceded some portion of the

sovereignty that had been theirs.[3] The Eleventh Amendment was not intended to change the original understanding of the Constitution. Rather, it restored the widespread understanding of the Constitution prior to the decision in Chisolm v. Georgia, 2 U.S. (2

[3] "Prior to the drafting of the Constitution, at least four States followed the practice of passing private Acts to relieve individual debtors. Given the sovereign status of the States, questions were raised as to whether one State had to recognize the relief given to a debtor by another State. Uniformity among state debtor insolvency laws was an impossibility and the practice of passing private bankruptcy laws was subject to abuse if the legislators were less than honest. Thus, it is not surprising that the Bankruptcy Clause was introduced during discussion of the Full Faith and Credit Clause. The Framers sought to provide Congress with the power to enact uniform laws on the subject enforceable among the States. Similarly, the Bankruptcy Clause's uniformity requirement was drafted in order to prohibit Congress from enacting private bankruptcy laws. The States' practice of enacting private bills had rendered uniformity impossible." Gibbons, at 473. (Citations omitted.)

Dall) 419 (1793). See e.g., Alden.[4] With that, the idea that the Amendment restored the original understanding, the question is what was ceded by the States in the original constitutional scheme. Did the Framers contemplate Congress could require the States to come to a federal bankruptcy forum, and be bound by rulings made there when States were creditors?

This is a particularly challenging inquiry for several reasons. The origin and purpose of the Bankruptcy Clause was meagerly discussed by the Framers. Reliance on pre-existing law is of limited usefulness. The meaning of the Bankruptcy Clause has repeatedly been held to have been independent of the kinds of laws in existence in England or the colonies at

[4] The text and history of the Eleventh Amendment also suggest that Congress acted not to change but to restore the original constitutional design. . . . By its terms, then, the Eleventh Amendment did not redefine the federal judicial power but instead overruled the Court. . . . Given the outraged reaction to *Chisholm*, as well as Congress' repeated refusal to otherwise qualify the text of the Amendment, it is doubtful that if Congress meant to write a new immunity into the Constitution it would have limited that immunity to the narrow text of the Eleventh Amendment. . . . The more natural inference is that the Constitution was understood, in light of its history and structure, to preserve the States' traditional immunity from private suits. As the Amendment clarified the only provisions of the Constitution that anyone had suggested might support a contrary understanding, there was no reason to draft with a broader brush. Alden at 722-24.

the time of the adoption of the Constitution.[5] Hanover Bank v. Moyses, 186 U.S. 181, 186-87(1902); Continental Illinois National Bank and Trust Co. v. Chicago, Rock Island and Pacific Railway, Co., 294 U.S. 648, 668-69 (1934); and Adair v. Bank of America National Trust and Savings Association, 303 U.S. 350 (1938). Rather, this Court has said this power is incapable of final definition and is subject to extensive legislative discretion, Sturges v. Crowninshield, 12 U.S. (4 Wheat.) 122 (1819); Moyses, supra; Continental Illinois, supra; Wright v. Union Central Life Insurance Co., 304 U.S. 502 (1938); Blanchette v. Connecticut General Insurance Corps., 419 U.S. 102 (1974); and, Gibbons, supra. This Court has described this clause as concerning the power to discharge debts and to distribute property, Moyses; a person's general inability to pay his debts, Continental Illinois; and the relations between an insolvent and his creditors, Wright.

Also contributing to the difficulty was the lack of a permanent bankruptcy law during most of the nineteenth century. A permanent bankruptcy law has existed only since 1898. Prior to that time, bankruptcy laws were in effect only from1800 to 1803, from 1841 to 1843, and from 1867 to 1878. Consequently, there have been only limited opportunities to delineate the proper intersection of the broad grant of authority in the Bankruptcy Clause with principles of sovereign immunity.

---

[5] Such laws were limited to traders and merchants. Voluntary bankruptcy was not known. Continental Illinois, infra at 668. Compositions and reorganizations were not part of those early practices. Adair infra at 354.

Only one cryptic lower court decision from the nineteenth century appears to address the problem at all. In In re: Greenville & C.R. Co., 10 F.Cas. 1180 (D.C. S.C. 1872)(No. 5,787). (Decided under the Bankruptcy Act of 1867), the Court held, "Whatever the lien or interest the state may have in or upon the property of [a debtor] the jurisdiction of the bankruptcy court is not ousted because the state is a creditor." This case seems to have arisen after the State of South Carolina had initiated an action in state court as a guarantor of railroad bonds to have the railroad liquidated and all creditors paid. See additional discussion of the course of this litigation in Parsons v. Greenville & C.R. Co., 18 F.Cas. 1255 (C.C.A. E.D. S.C. 1877) (No. 10,776). The decision that jurisdiction could be exercised, even though the State was a creditor, can only lead to the inference that a sovereign immunity claim was made and rebuffed.

In the twentieth century, cases from this Court suggest that States lack the power as sovereign entities to defeat application of the bankruptcy scheme established by Congress. In New Jersey v. Anderson, 203 U.S. 483 (1906) this Court held that whether a debtor's obligation to a State was a tax obligation entitled to priority as a tax under the Bankruptcy Act was a question of federal, not state, law. The Court continued that the meaning of the Bankruptcy Act could not be altered by any expression of a State legislature.

In Van Huffel v. Harkelrode, 284 U.S. 225 (1931) this Court considered whether a bankruptcy court could order the sale of property, to which a state tax

lien had attached, free and clear of all liens, with the liens attaching to the proceeds. The State had resisted because such a sale could result in extinguishing the state lien without full payment of the state tax. Under prior practice, the purchaser had to satisfy such state tax liens in full. See Black, H.C., A Treatise on the Law and Practice of Bankruptcy, (4th Ed. Kansas City, Mo. 1926) at page 820. Nonetheless, this Court held that bankruptcy power was sufficient to permit such interference with a state tax lien.

In New York v. Irving Trust Co., 288 U.S. 329 (1933), the efficacy of an order setting a final date for filing tax claims was at issue. After the order had been served on New York, the State filed a claim that was tardy under the terms of the order. Despite being tardy, New York argued that such limits could not be imposed on a sovereign State. This Court upheld the validity of the procedural order and denied the claim.

Irving Trust is particularly significant for Eleventh Amendment purposes. Prior to establishing a bar date for tax claims, New York had not appeared in the bankruptcy case. When it tardily appeared, New York claimed a sovereign right to be paid on its tax claim before other creditors per the rule of Marshall v. New York, 254 U.S. 380 (1920). New York was rebuffed. Irving Trust at 331. Even though New York had not appeared, state sovereignty yielded to the order of the bankruptcy court. If New York had Eleventh Amendment immunity, how could that order have become effective on a non-appearing sovereign entity? Yet, a unanimous Court held the order was binding. Ergo, New York lacked such immunity.

In Gardner v. New Jersey, 329 U.S. 565 (1945), the Court held that a trustee's petition to adjudicate New Jersey's tax claims could be heard over the objection that "the petition would constitute a prohibited suit against the state." Id. at 571. The Court reasoned that by filing a proof of claim, New Jersey had submitted to an adjudication of the validity and priority of its claims. Relying on waiver principles, no prohibited suit against a State was found to exist.

The Court also concluded all property of a debtor and not merely the equity in the property was found subject to jurisdiction of the bankruptcy court.[6] The portion of property on which New Jersey claimed a lien was subject to bankruptcy court jurisdiction in reliance on Van Huffel, supra, and Irving Trust, supra. This holding does not depend on New Jersey having filed a claim. The validity of the lien of the State was subject to adjudication whether the State appeared or not. Sovereign immunity from suit would not protect property in which a State claimed a lien if the State failed to appear. How could such a judgement be made against a non-appearing party, if by not appearing the party would have remained immune? One can only conclude again that there was no immunity.

---

[6] This outcome is consistent with California v. Deep Sea Research, Inc., 523 U.S. 491 (1998), which found the Eleventh Amendment inapplicable to the exercise of admiralty jurisdiction where a state does not possess the res. The current Bankruptcy Code, 11 U.S.C. § 543, gives power to bankruptcy courts to require turnover of property from a receiver appointed by a state court. See In re: 245 Associates, L.L.C., 188 B.R. 743 (Bank. S.D. N.Y. 1995).

In City of New York v. Saper, 336 U.S. 328 (1949) this Court considered whether another change in the bankruptcy law was effective. Under prior practice federal, state and municipal authorities were entitled to be paid post-petition interest on tax claims through the date of payment. Statutory revisions eliminated interest after filing. This caused monies that would have been paid to governmental entities for post-petition interest to be paid to others. Without dissent, this Court held Congress had the power to eliminate post-petition interest on *inter alia* state taxes and Congress had purposely done so.

More recently Perez v. Campbell, 402 U.S. 637 (1971) invalidated a state statute denying a person a license to drive for non-payment of a debt discharged in bankruptcy. The Court held such a statute interfered with debtors obtaining a fresh start. The Supremacy Clause was the specific provision relied upon by the Court.

Clearly, Congress has the power under the Bankruptcy Clause to supercede state law. More significantly Congress has the power to adjust the relationship of a debtor to a State-creditor even where the State-creditor does not appear. Congress can even do so by limiting the most fundamental aspect of sovereignty, the power to impose and collect taxes. Anderson, Van Huffell, Irving Trust, Saper and

Gardner, all limit sovereignty[7] in the collection of state taxes.[8] Such a power unmistakably has the potential to impact state treasuries.

In Tennessee Student Assistance Corp. v. Hood, 541 U.S. 509 (2004), the Court upheld the power of the Bankruptcy Courts to discharge debts owed to States.

Although Anderson, Van Huffel, Irving Trust, Gardner, Saper, and Hood did not rely upon any part of The Federalist for support, support exists. In The Federalist, No. 32, Hamilton began by stating the general principle of sovereignty as including an uncontrollable authority to raise revenue. He wrote:

> Although I am of opinion that there would be not real danger of the consequences which seem to be

---

[7] A note in the majority opinion in Seminole Tribe provides; "It has not been widely thought that the federal antitrust, bankruptcy or copyright statutes have abrogated the States' sovereign immunity. This Court has never awarded relief against a State under any of those statutory schemes. . . ." Id. at 72 n.16. These cases, relied upon here, were not under discussion at that time, and may have been overlooked.

[8] Today, 11 U.S.C. § 507(a)(8) defines which taxes are entitled to priority status. Taxes in this category are exempt from discharge per 11 U.S.C. § 523. Taxes not within this category (income taxes more than 3 years old, for example) may be discharged in a Chapter 7 case whether or not a proof of claim is filed, 11 U.S.C. § 727(a) and (b). A Chapter 13 plan needs to provide for full payment only of priority taxes 11 U.S.C. § 1322(a)(2). Upon completion of such a plan, the debtor obtains a discharge of all debts not required to be paid by the plan. 11 U.S.C. § 1328. This can operate to discharge non-priority taxes.

apprehended State governments from a power in the Union to control them in the levies of money,. . .I am willing here to allow, in its full extent, the justness of the reasoning which requires that the individual States should possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants. And making this concession, I affirm that (with the sole exception of duties on imports and exports) they would, under the plan of the convention retain that authority in the most absolute and unqualified sense; and that an attempt on the part of the national government to abridge them in the exercise of it, would be a violent assumption of power, unwarranted by any article or clause of its Constitution. . . .

This broad statement was then modified in three particulars:

> But as the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, exclusively delegated to the United States. This exclusive delegation, or rather this alienation, of State sovereignty, would only exist in three cases: where the Constitution in express

terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally *contradictory and repugnant*...

These three cases of exclusive jurisdiction in the federal government may be exemplified by the following instances: The last clause but one in the eighth section of the first article provides expressly that Congress shall exercise *"exclusive legislation"* over the district to be appropriated as the seat of government. This answers to the first case. The first clause of the same section empowers Congress *"to lay and collect taxes, duties, imposts, and excises"*; and the second clause of the tenth section of the same article declares that, *"no State shall,* without the consent of Congress, *lay any imposts or duties on imports or exports,* except for the purpose of executing its inspection laws." Hence would result an exclusive power in the Union to lay duties on imports and exports, with the particular exception mentioned; but this power is abridged by another clause, which declares that no tax or duty shall be laid on articles exported from any

> State; in consequence of which qualification, it now only extends to the *duties on imports*. This answers to the second case. The third will be found in that clause which declares that Congress shall have power "to establish an UNIFORM RULE of naturalization throughout the United States." This must necessarily be exclusive; because if each State had power to prescribe a DISTINCT RULE, there could not be a UNIFORM RULE. . . .

The Federalist No. 32.

The Bankruptcy power probably meets two of these criteria. The Bankruptcy Clause shares a uniformity requirement with the Naturalization Clause. The Bankruptcy power also meets the conditions of the second case. Power is given to Congress to enact bankruptcy provisions in Article I, Section 8, clause 4. As has been discussed, the power to impair contracts is an essential component of this power. Gibbons, supra. The States clearly cede that power in Article I, Section 10. The constitutional scheme for bankruptcy meets two of the independent criteria for finding an exception to state sovereignty. State sovereignty over taxation would yield to the exercise of the bankruptcy power by Congress.

Examination of the first bankruptcy law is of limited assistance in this inquiry into the intent of the Framers. The first Act provided in section 62, that "nothing contained in this law shall, in any manner, . . .

to lessen or impair any right to . . . money due the United States or to any of them. See Act of April 4, 1800, Ch. XIX, 2 Stat. 19, 36 (1800) repealed by Act of Dec. 19, 1803 Ch. 6, 2 Stat. 248. Some would say this was a recognition by the earliest Congress that it could not impair debts owed to states. But the language also supports the conclusion that although Congress recognized it had the power to affect the relationship between debtors and State-creditors, it chose not to.

During the nineteenth century, Congress did impair State tax collection by limiting the priority of claims made by states in the distribution scheme. In Section 5 of the Act of August 19, 1841, Ch. IX, 5 Stat. 440, 444-46, repealed by Act of March 3, 1843, Ch. 82 5 Stat. 614. Congress prioritized the distribution scheme by placing the United States, persons entitled to preference under other laws of the United States, and wage-earners in a position to obtain funds from the liquidating official, an assignee, before payments to any other creditor. The States received no priority of distribution superior to unsecured creditors. In Section 27 of the Act of March 2 1867,Ch. 176, 14 Stat. 517, 530-31, repealed by Act of June 7, 1878, C. 160, 20 Stat. 99, debts, taxes and assessments due to the State in which the proceedings were pending were given a third priority of distribution, although the statute elsewhere provided that no interference with federal or states collection was to occur. In In re: Ambler, 1 F.Cas. 588 (D.C. S.D.N.Y. 1875)(No. 270) the Court held that Texas was not entitled to a priority distribution under the third priority in proceedings pending in New York. The claim of Texas was instead placed on a par with unsecured creditors. Although it is difficult to infer

much from this legislation about the early views of Congress concerning its power, there is some modest subordination of state taxes, and consequently interference with state sovereignty.

During the twentieth century, the Nation first enjoyed permanent bankruptcy legislation. Cases considering the intersection of the Bankruptcy power and state sovereign immunity began to reach this Court. On five specific occasions, Anderson, Van Huffel, Irving Trust, Gardner and Saper, this Court has found the Bankruptcy power sufficient to affect the fundamental power of a sovereign State to collect taxes. Although limited, The Federalist No. 32 recognizes that state sovereignty yields to the Bankruptcy power. Although very limited bankruptcy legislation existed during the nineteenth century, that power, at times, impacted the distribution of a bankrupts' property in payment of state taxes. Although sparse, lower court opinions from that era support the validity of such encroachments and no cases deny the validity of such power. Such a record is the "compelling evidence" of a feature "inherent in the constitutional compact." Alden supra at 741. Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991).

This brief has so far analyzed The Federalist, No. 32, in Hamilton's original context, interference with the sovereign power of taxation. The Bankruptcy power appears sufficient to support such interference. Admittedly, not being sued is an attribute of sovereignty distinct from the collection of taxes. Still, in discussing the judicial power in The Federalist, No. 81, Hamilton wrote:

> The circumstances which are necessary to produce an alienation of State sovereignty were discussed in the article of taxation, and need not be repeated here.

Hamilton's perception that further discussion of sovereignty was unnecessary suggests he saw no distinction between a state's sovereignty and its sovereign immunity from suit. If one such factor stands, so does the other: if one fails, so does the other. The United States Court of Appeals for the Sixth Circuit, found the plan of convention contained the cession of state sovereign immunity where necessary to effect a scheme designed by Congress under the Bankruptcy Clause.

The ability of Congress to discharge a bankrupt's debt to a State for taxes is clear and is more clear since the decision in Hood. The only notice necessary to achieve said relief for non-priority debts is the notice that a debtor has filed for relief.[9] If that can be done, then why cannot Congress require turnover of property of the estate to pay superior claims, such as wages, alimony and child support and to treat state, local and federal taxes on equal footing.[10]

---

[9] Such notice was found sufficient notice to creditors in Moyses, supra.

[10] A preference exists only where a creditor has received more in advance of bankruptcy than it can in bankruptcy 11 U.S.C. § 547(b)(5). This rule promotes equality of treatment among unsecured creditors, and payment of recognized priorities for wages; 11 U.S.C. § 507(a)(3) child support; 11 U.S.C. § 507(a)(5); and, taxes 11 U.S.C. § 507(a)(8). To name a few.

This analysis actually unmasks the claim that this is a case to resolve Eleventh Amendment immunity. It is actually an effort by States to opt out of the bankruptcy scheme altogether. Cases and commentators have described numerous difficulties which would occur if the Eleventh Amendment provides an opportunity for States to opt out of the bankruptcy system. See McVey Trucking, Inc. v. Sec'y of State of Illinois (In re: McVey Trucking, Inc.), 812 F2d 311, 328 (1987) (problems of making a state a preferred creditor). See e.g., Lieb, R., Eleventh Amendment Immunity of a State in Bankruptcy Cases: A New Jurisdictional Approach, 7 Am. Bank. Inst. L.Rev. 269, 279-282(1999); Klee, K. N., Johnston, J. O., Winston, E., State Defiance of Bankruptcy Law, 52 Vanderbilt L.Rev. 1527 (1999); and, Browning, M., Tough Bankruptcy Issues Under the Eleventh Amendment, 7 J. of Bankruptcy Law and Practice 219 (1998). Current law would need to be rewritten at length.

Petitioners seek to undo a century of decisions upon which Congress has built the current bankruptcy

scheme. This would create chaos. This effort should be rejected.

Instead, this Court should find that the uniqueness of the Bankruptcy Clause, in conjunction with the Contract Clause limitation on the States, as well as the historical vision of the Framers, and the prior decisions of this Court all support abrogation of state sovereign immunity in the bankruptcy context.

This result does not require re-analysis of the logic of Seminole Tribe. Nor does it open a proverbial "Pandora's box." Congress cannot use the Bankruptcy power to enact non-bankruptcy laws, just as it could not create Article III jurisdiction in the bankruptcy courts.[11] In Gibbons, now Chief Justice Rhenquist found no difficulty in distinguishing the Bankruptcy power from the power granted Congress in the Commerce Clause. He specifically concluded that power under the Commerce Clause could not be substituted for the Bankruptcy power to evade the uniformity requirements of the Bankruptcy power. This holding is contradicted only by the dicta of a dissent. See Hoffman v. Connecticut Department of Maintenance, 492 U.S. 96, 106 (1989)(Marshal, J. dissenting) (no distinction between the Commerce Clause and the Bankruptcy Clause). The power, and the logic, of Gibbons should be recognized as superior.

---

[11] In the wake of Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) Congress enacted distinctions between core and non-core bankruptcy jurisdiction. 28 U.S.C. § 157(b)(2)(3) and (4). Such distinctions must be plead in the complaint filed in an adversary proceeding. Bankruptcy Rule of Procedure 7008(a).

Congress has repeatedly been held to have the power to enact legislation that changes the relationship between debtors and creditor-States, and so impact State treasuries. Congress has the power to require States to follow established procedures when States participate in bankruptcy proceedings. Congress has the power to establish standards for adjudicating the priority to be afforded State claims. Petitioners' effort to avoid abrogation of its sovereign immunity must be evaluated in this historical context. When this analysis is performed, only one conclusion remains that the Eleventh Amendment is inapplicable in the bankruptcy context.

CONCLUSION

WHEREFORE the *amicus curiae* ask that the decision of the United States Court of Appeals for the Sixth Circuit be affirmed.

RESPECTFULLY SUBMITTED,

Martin P. Sheehan
Counsel of Record
41 Fifteenth Street
Wheeling, West Virginia 26003
(304) 232-1064

Counsel for Amicus Curiae
National Association of
Bankruptcy Trustees

Supreme Court, U.S.
FILED
AUG 22 2005
OFFICE OF THE CLERK

No. 04-885

IN THE

Supreme Court of the United States

CENTRAL VIRGINIA COMMUNITY COLLEGE,
VIRGINIA MILITARY INSTITUTE,
NEW RIVER COMMUNITY COLLEGE, and
BLUE RIDGE COMMUNITY COLLEGE,

Petitioners,

v.

BERNARD KATZ, Liquidating Supervisor of the Bankruptcy Estate in *In re Wallace's Bookstores, Inc.*,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

G. Eric Brunstad, Jr.
BINGHAM MCCUTCHEN LLP
One State Street
Hartford, CT 06103
(860) 240-2717

Kim Martin Lewis
Counsel of Record
Jon L. Fleischaker
Mark A. Vander Laan
Jeremy S. Rogers
DINSMORE & SHOHL LLP
255 East Fifth St., Suite 1900
Cincinnati, OH 45202
(513) 977-8200

Counsel for Respondent

QUESTIONS PRESENTED

1. Whether a state agency's filing of a proof of claim and participation in a bankruptcy case waives the State's sovereign immunity with respect to a preference action to recover funds that the State or its agencies have no right to retain and that may be administered as part of the bankruptcy estate.

2. If Petitioners' claim of sovereign immunity is not waived, whether the Eleventh Amendment bars a preference action brought by a court-appointed official supervised by the Department of Justice on behalf of a federally created bankruptcy estate to recover funds that the State or its agencies have no right to retain and that may be administered as part of the estate.

3. If Petitioners' claim of sovereign immunity is not waived, whether the Eleventh Amendment bars a bankruptcy court from exercising *in rem* jurisdiction to determine title to funds received by a state agency and to recover the funds that the agency has no right to retain and that may be administered as part of the estate.

4. If Petitioners' claim of sovereign immunity is not waived, whether Petitioners lack a defense of sovereign immunity because in ratifying the Constitution the States ceded their immunity with respect to the administration of uniform bankruptcy proceedings.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES vi

BRIEF FOR RESPONDENT 1

STATEMENT 1

A. General Background and Wallace's Bankruptcy Filing 1

B. VMI's Proof of Claim and the Proofs of Claim filed by other Virginia Educational Entities 2

C. Wallace's Sale of its Bookstore Assets 3

D. Wallace's Chapter 11 Plan and the Bankruptcy Court's Appointment of Respondent Katz to Serve as Trustee of the Estate 5

E. The Claims Allowance and Adjustment Process, and Petitioners' Preference Obligations 6

F. Disposition in the Courts Below 8

SUMMARY OF ARGUMENT 9

ARGUMENT 10

A. Petitioners Have Waived Any Claim of Sovereign Immunity. 10

1. The Court should consider Respondent's waiver argument. 10

2. A state agency waives sovereign immunity by filing a proof of claim. 11

3. A state agency waives the State's sovereign immunity when it files a proof of claim, and this waiver binds all "arms" of the same State. 14

4. A state agency's waiver of sovereign immunity by filing a proof of claim includes waiver of sovereign immunity with respect to any preference action that the estate may have against the State or its agencies. 16

B. Petitioners Cannot Invoke Sovereign Immunity Because the Adversary Proceedings Were Brought By the Court-Appointed Representative of A Federally Created Entity That Falls Under the Supervision of the Department of Justice. 20

1. The Court should consider Respondent's "federal entity" argument. 20

2. The bankruptcy estate is a special entity to which the Eleventh Amendment does not apply. 21

C. Sovereign Immunity Is Not Available to Bar the Bankruptcy Court's *In Rem* Jurisdiction Over Property that Should Be Returned to the Bankruptcy Estate. 26

1. The Court should consider Respondent's *in rem* argument. 26

2. Bankruptcy courts possess broad *in rem* authority to marshal the assets of an estate and adjust the rights of creditors 27

3. The administration of the Code's preference avoidance and recovery rules lies within the bankruptcy court's *in rem* authority and does not constitute a suit for money damages. 30

4. The bankruptcy court may recover a preferential transfer from a State in the exercise of its *in rem* authority, and the Eleventh Amendment does not apply. 33

5. Respondent is entitled to recover the relevant funds from Petitioners even if Petitioners have disbursed funds from their accounts. 38

D. By Constitutional Design, the States Have No Sovereign Immunity to a Bankruptcy Court's *In Rem* Bankruptcy Jurisdiction. 39

1. Congress has unmistakably indicated its intent to abrogate sovereign immunity in the application of sections 547, 542, 550, and 551 under section 106. 40

2. In the exercise of its Bankruptcy Power, Congress has a unique and comprehensive authority that includes the ability to bind States to critical aspects of bankruptcy proceedings – including the preference rules. 40

3. Under the plan of the convention, the States surrendered their sovereignty to disregard the administration of bankruptcy cases, including the authority to determine questions of title and recover property. 46

CONCLUSION 50

TABLE OF AUTHORITIES

FEDERAL CASES

Acme Harvester Co. v. Beekman Lumber Co., 222 U.S. 300 (1911) 27, 41

Aetna Cas. & Sur. Co. v. United States, 71 F.3d 475 (2d Cir. 1995) 39

Alden v. Maine, 527 U.S. 706 (1999) ..... *passim*

Alexander v. Hillman, 296 U.S. 222 (1935) 18, 19

Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592 (1982) 25, 26

Allard v. Weitzman (In re DeLorean Motor Co.), 991 F.2d 1236 (6th Cir. 1993) 23

Babbitt v. Dutcher, 216 U.S. 102 (1910) 42

Balser v. Department of Justice, 327 F.3d 903 (9th Cir. 2003) 23

Barton v. Barbour, 104 U.S. 126 (1881) 24

Begier v. IRS, 496 U.S. 53 (1990) 6, 7, 29

Bennett v. Spear, 520 U.S. 154 (1997) 11

Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991) 22, 24

Bowen v. Massachusetts, 487 U.S. 879 (1988) 32

Bronx Brass Foundry, Inc., v. Irving Trust Co., 297 U.S. 230 (1936) ..... *passim*

Bull v. United States, 295 U.S. 247 (1935) 35

California v. Deep Sea Research, Inc., 523 U.S. 491 (1998) 36

Caspari v. Bohlen, 510 U.S. 383 (1994) 21

Caterpillar, Inc. v. Lewis, 519 U.S. 61 (1996) 20-21

In re Charter Oak Assocs., 361 F.3d 760 (2d Cir. 2004) 15

Clark v. Barnard, 108 U.S. 436 (1883) 12, 19

Cohens v. Virginia, 19 U.S. 264 (1821) 33, 46

College Sav. Bank v. Florida Prepaid Postsecondary Ed. Expense Bd., 527 U.S. 666 (1999) 12

Curry v. Castillo (In re Castillo), 297 F.3d 940 (9th Cir. 2002) 23

Dandridge v. Williams, 397 U.S. 471 (1970) 11

Edelman v. Jordan, 415 U.S. 651 (1974) 38

Ex Parte Baldwin, 291 U.S. 610 (1934) 30

Ex Parte Young, 209,U.S. 123 (1908) 35

FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990) 21

Federal Mar. Comm'n v. South Carolina State Ports Auth., 535 U.S. 743 (2002) 15

Florida v. Treasure Salvors, Inc., 458 U.S. 670 (1982) 35, 36

Gardner v. New Jersey, 329 U.S. 565 (1947) ..... *passim*

Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 18

Gregory v. United States Bankr. Court, 942 F.2d 1498 (10th 1991) 23

Gunter v. Atlantic Coast Lines R. Co., 200 U.S. 273 (1906) 12

Hanover Nat'l Bank of New York v. Moyses, 186 U.S. 181 (1902) 45, 48

Hans v. Louisiana, 134 U.S. 1 (1890) 22

Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc., 530 U.S. 238 (2000) 20

Hoffman v. Connecticut Dep't of Income Maint., 492 U.S. 96 (1989) 33

Hood v. Tennessee Student Assistance Corp., 319 F.3d 755 (6th Cir. 2003) ..... *passim*

International Shoe Co. v. Pinkus, 278 U.S. 261 (1929) ..... *passim*

Isaacs v. Hobbs Tie & Timber Co., 282 U.S. 734 (1931) 33

Joelson v. United States, 86 F.3d 1413 (6th Cir. 1996) 23

Katchen v. Landy, 382 U.S. 323 (1966) 2, 18

Keppel v. Tiffin, 197 U.S. 356 (1905) 6

Land v. Dollar, 330 U.S. 731 (1947) 35

Langenkamp v. Culp, 498 U.S. 42 (1990) 18

Lapides v. Board of Regents, 535 U.S. 613 (2002) ..... *passim*

Lathrop v. Drake, 91 U.S. 516 (1875) 42

Lebovits v. Scheffel (In re Lehal Realty Assocs.), 101 F.3d 272 (2d Cir. 1996) 23

Lebron v. National R.R. Passenger Corp., 513 U.S. 374 (1995) 20

In re Linton, 136 F.3d 544 (7th Cir. 1998) 23

Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration, 113 U.S. 33 (1885) 10

Meigs v. M'Clung's Lessee, 13 U.S. 11 (1815) 35

Minnesota v. National Tea Co., 309 U.S. 551 (1940) 10-11

Missouri v. Jenkins, 491 U.S. 274 (1989) 38

Missouri v. Jenkins, 515 U.S. 70 (1995) 21

New York v. Irving Trust Co., 288 U.S. 329 (1933) ..... *passim*

Nixon v. Fitzgerald, 457 U.S. 731 (1982) 10

Noble v. Union River Logging R.R. Co., 147 U.S. 165 (1893) 35

North Dakota v. Minnesota, 263 U.S. 365 (1923) 25

Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) 40

Ogden v. Saunders, 25 U.S. 213 (1827) 45

Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe, 498 U.S. 505 (1991) 19

Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824) 25, 34

Pennsylvania v. New Jersey, 426 U.S. 660 (1976) 25

Perez v. Campbell, 402 U.S. 637 (1971) 33

Ponte v. Real, 471 U.S. 491 (1985) 11

Porto Rico v. Ramos, 232 U.S. 627 (1914) 12

Principality of Monaco v. Mississippi, 292 U.S. 313 (1934) 22

Printz v. United States, 521 U.S. 898 (1997) 46

Procunier v. Navarette, 434 U.S. 555 (1978) 21

Railway Labor Executives' Ass'n v. Gibbons, 455 U.S. 457 (1982) 43

Regents of the Univ. of Cal. v. Doe, 519 U.S. 425 (1997) 15, 17

Richardson v. Fajardo Sugar Co., 241 U.S. 44 (1916) 12

River Prod. Co. v. Webb (Matter of Topco, Inc.), 894 F.2d 727 (5th Cir. 1990) 23

Sante Fe Pac. R.R. Co. v. Payne, 259 U.S. 197 (1922) 35

Schiro v. Farley, 510 U.S. 222 (1994) 11

Seminole Tribe v. Florida, 517 U.S. 44 (1996) ..... *passim*

Sherman v. Bingham, 21 F. Cas. 1270 (1st Cir. 1872) 41, 42

Smith v. Reeves, 178 U.S. 436 (1900) 25, 35

Stellwagon v. Clum, 245 U.S. 605 (1918) 45

Straton v. New, 283 U.S. 318 (1931) ..... *passim*

Sturges v. Crowninshield, 17 U.S. 122 (1819) 40, 45

Tennessee Student Assistance Corp. v. Hood, 541 U.S. 440 (2004) ..... *passim*

Tindal v. Wesley, 167 U.S. 204 (1897) 35

Union Bank v. Wolas, 502 U.S. 151 (1991) 6, 7

United States v. American Ry. Express, Co., 265 U.S. 425 (1924) 11

United States v. Fisher, 6 U.S. 358 (1805) 49

United States v. Lee, 106 U.S. 196 (1882) 35

United States v. Mississippi, 380 U.S. 128 (1965) 22

United States v. Nordic Village, Inc., 503 U.S. 30 (1992) 37

United States v. Peters, 9 U.S. 115 (1809) 34

United States v. Shaw, 309 U.S. 495 (1940) 19

United States v. State Bank, 96 U.S. 30 (1877) ... 34, 35

United States v. Texas, 143 U.S. 621 (1892) 22

United States v. United States Fid. & Guar. Co., 309 U.S. 506 (1940) 19

United States v. Whiting Pools, 462 U.S. 198 (1983) 28, 29, 31

Van Huffel v. Harkelrode, 284 U.S. 225 (1931) ..... *passim*

Vass v. Conron Bros. Co., 59 F.2d 969 (2d Cir. 1932) 23

Washington v. Confederated Bands & Tribes of Yakima Indian Nation, 439 U.S. 463 (1979) 11

Wolf v. Weinstein, 372 U.S. 633 (1963) 24

In re Wood, 210 U.S. 246 (1908) 42, 43

Ex Parte Young, 209 U.S. 123 (1908) 35

Young v. Higbee Co., 324 U.S. 204 (1945) 27

Yee v. Excondido, 530 U.S. 519 (1992) 20

OTHER CASES

The Case of Bankrupts, 76 Eng. Rep. 441 (K.B. 1584) 48

Worsely v. DeMattos, 1 Burr. 467, 96 Eng. Rep. 1160 (K.B. 1758) 48

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. XI 21

U.S. CONST., art. I, § 8, cl. 4 39

FEDERAL STATUTES AND RULES

2 Stat. 164 49

2 Stat. 19 49

2 Stat. 32 49

11 U.S.C. § 101 1

11 U.S.C. § 101(5) 2

11 U.S.C. § 101(10) 2

11 U.S.C. § 101(15) 2

11 U.S.C. § 101(27) 2

11 U.S.C. § 106(a)(1) 39

11 U.S.C. § 323 23

11 U.S.C. § 323(a) 5

11 U.S.C. § 324 23

11 U.S.C. § 327 23

11 U.S.C. § 330 23

11 U.S.C. § 362(a) 2

11 U.S.C. § 363(b) 4

11 U.S.C. § 501(a) 2, 6

11 U.S.C. § 502(a) 6

11 U.S.C. § 502(b) 2, 6

11 U.S.C. § 502(d) 6, 13, 17

11 U.S.C. § 541 1

11 U.S.C. § 542(a) 6, 31

11 U.S.C. § 547 ..... 30, 31

11 U.S.C. § 547(b) 6

11 U.S.C. § 550(a) ..... passim

11 U.S.C. § 551 ..... 6, 31

11 U.S.C. § 1101(1) 3

11 U.S.C. § 1102 3

11 U.S.C. § 1104 23

11 U.S.C. § 1129 5

11 U.S.C. § 1141 5

28 U.S.C. § 157(b)(1) 17

28 U.S.C. § 157(2)(B) 17

28 U.S.C. § 157(2)(C) 17

28 U.S.C. § 157(2)(F) 17

28 U.S.C. § 581 3

28 U.S.C. § 586 23

28 U.S.C. § 1334(e) 1

Fed. R. Bankr. P. 3001 2

Fed. R. Bankr. P. 3002 2

Fed. R. Bankr. P. 3002(a) 2

Fed. R. Bankr. P. 3002(c)(3) 37

STATE STATUTES

Ky. Rev. Stat. Ann. § 378.060 (Michie 2004) 7

Va. Code §§ 2.2-4300, *et seq* 5

MISCELLANEOUS

F. Regis Noel, A HISTORY OF THE BANKRUPTCY LAW, (2002) 49

Peter J. Coleman, DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUPTCY, 1607-1900 (1974) 48-49

THE FEDERALIST NO. 32 (Alexander Hamilton)..... 47

THE FEDERALIST NO. 81 (Alexander Hamilton).. 46, 47

16 James Wm. Moore, et al., MOORE'S FEDERAL PRACTICE § 108.70[1] (3d Ed. 2004) 37

Thomas E. Plank, *Bankruptcy and Federalism,* 71 Fordham L. Rev. 1063 (2002)..... 49

BRIEF FOR RESPONDENT

This matter arises out of the chapter 11 bankruptcy case of Wallace's Bookstores, Inc. ("Wallace"). Petitioners are Virginia Military Institute ("VMI"), Central Virginia Community College ("Central"), New River Community College ("New River"), and Blue Ridge Community College ("Blue Ridge"). Petitioners contend that, "[l]ike all public institutions of higher education in Virginia, [Petitioners] are considered the Commonwealth [of Virginia] for purposes of sovereign immunity." Pet. Br. at 1 n.1. Petitioners are represented by their counsel, Virginia Attorney General Judith Williams Jagdmann. *Id.* at 1. Respondent is Bernard Katz ("Katz" or "Respondent"), the court-appointed liquidating supervisor for Wallace's bankruptcy estate.

STATEMENT

A. General Background and Wallace's Bankruptcy Filing

Prior to filing for bankruptcy, Wallace operated a chain of college bookstores, and supplied new and used textbooks for students. Wallace did business with each of the Petitioners, including operating campus bookstores at VMI, Central, Blue Ridge, and New River. On February 28, 2001, Wallace commenced its bankruptcy case by filing a petition for relief under chapter 11 the Bankruptcy Code, 11 U.S.C. §§ 101, *et seq*.

By operation of federal law, when a debtor commences a bankruptcy case, a bankruptcy estate is created consisting of all of the debtor's property wherever located. 11 U.S.C. § 541. Likewise, the federal court in which the case is commenced is vested with exclusive *in rem* jurisdiction over all property of the bankruptcy estate, and the estate is formed *in custodia legis*. 28 U.S.C. § 1334(e); *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 447 (2004); *Straton v. New*, 283 U.S. 318, 320-21 (1931). Accordingly, if a governmental entity has seized possession of property in which the estate has an interest before the debtor commences its bankruptcy case, the bankruptcy court may direct the entity to relinquish possession of the property to

the representative of the estate so that it may be administered as part of the estate. *United States v. Whiting Pools*, 462 U.S. 198, 211 (1983). In this case, after Wallace filed its chapter 11 petition, all of its property became vested in its bankruptcy estate to be administered as prescribed by the Bankruptcy Code.

The filing of a bankruptcy petition also triggers the "automatic stay," which enjoins all debt collection activity against the debtor and property of the estate during the bankruptcy proceeding. 11 U.S.C. § 362(a). In accordance with the automatic stay, Wallace's filing of its bankruptcy case prevented any of the Petitioners from taking action to collect their claims against Wallace or property of its estate.

B. VMI's Proof of Claim and the Proofs of Claim filed by other Virginia Educational Entities

Under the Bankruptcy Code, a debtor's monetary obligations constitute "claims" against the debtor's estate, and a creditor holding a pre-petition claim is entitled to file a "proof of claim" with the bankruptcy court. 11 U.S.C. §§ 101(5), 101(10), 501(a), 502(b); Fed. R. Bankr. P. 3001, 3002; *see Katchen v. Landy*, 382 U.S. 323, 336 (1966) ("bankruptcy . . . converts the creditor's legal claim into an equitable claim to a pro rata share of the *res*").[1] Only creditors (including state entities) that file proofs of claim may receive distributions from the debtor's bankruptcy estate. Fed. R. Bankr. P. 3002(a); *New York v. Irving Trust Co.*, 288 U.S. 329, 333 (1933).

---

[1] The Bankruptcy Code defines "creditor" as a person holding a claim that arises before the debtor commences a bankruptcy case. 11 U.S.C. § 101(10). The term "creditor" specifically includes a "governmental unit." 11 U.S.C. §§ 101(15), 101(27). The term "pre-petition" refers to claims or events arising or occurring *before* the debtor files a bankruptcy petition. Conversely, the term "post-petition" refers to claims or events arising or occurring *after* the debtor files.

In this case, on July 6, 2001, Petitioner VMI filed a proof of claim with the bankruptcy court asserting a claim of $43,237.60 against the estate.[2] In addition, on April 9, 2001, the Darden Graduate School of Business at the University of Virginia filed a proof of claim, and on June 25, 2001 filed two other proofs of claim.[3] On May 2, 2001, the Weldon Cooper Center for Public Service at the University of Virginia filed separate proofs of claim in the amounts of $1,038.80 and $155.76.[4] On June 19, 2001, Christopher Newport University filed a proof of claim in the amount of $869.03.[5] Numerous other creditors, including agencies of other States, also filed proofs of claim.

C. Wallace's Sale of its Bookstore Assets

Immediately after Wallace commenced its bankruptcy case, Wallace continued to operate its business as a "debtor in possession." 11 U.S.C. §§ 1101(1) (defining "debtor in possession" in a chapter 11 case), 1107 (prescribing duties of debtor in possession, including duties of trustee), 1108 (authorizing operation of business). On March 13, 2001, the Office of the United States Trustee – a division of the Department of Justice with oversight authority in bankruptcy cases – appointed a committee of unsecured creditors to take part in the administration of the case. 11 U.S.C. § 1102; *see* 28 U.S.C. §§ 581, *et seq.* Thereafter, in conjunction with the

---

[2] *See In re Wallace's Bookstores* (Bankr. E.D. Ky.) Case Nos. 50545 through 50606 (jointly administered) (the "Bankruptcy Case"), Claim No. 2748.

[3] *See* Bankruptcy Case Claim Nos. 148 ($1,297.31), 1251 ($1,297.28), 1252 ($1,297.28).

[4] *See* Bankruptcy Case Claim Nos. 247 ($1,038.80), 248 ($155.76).

[5] *See* Bankruptcy Case Claim No. 839 ($869.03).

creditors' committee, Wallace determined to sell its assets as the best means to maximize the value of its bankruptcy estate.

On April 10, 2001, the bankruptcy court entered an order approving bidding procedures for the sale of the estate's bookstore assets. *See* 11 U.S.C. § 363(b) (authorizing a bankruptcy court to approve the disposition of the estate's property). These included bookstores located at Central (the "Central Store"), VMI (the "VMI Store"), Blue Ridge (the "Blue Ridge Store") and New River (the "New River Store").[6] At the conclusion of the bidding process, the Follett Corporation ("Follett") was the high bidder for the Blue Ridge Store and the New River Store. Barnes and Noble College Bookstores, Inc. ("Barnes & Noble") was the successful bidder for the VMI Store and the Central Store.

By order dated May 18, 2001, the bankruptcy court approved Follett's bid and ordered Follett to use its best efforts to negotiate agreements with Blue Ridge and New River to effect a transition between Wallace and Follett at the Blue Ridge Store and the New River Store.[7] Both Blue Ridge and New River participated in the process and the transition of the stores at their campuses to Follett. On June 4, 2001, the bankruptcy court entered a similar order approving the sale of the VMI Store to Barnes & Noble.[8] VMI participated in this process by, *inter alia*, indicating a preference for Barnes & Noble as the successor operator for its bookstore. The bankruptcy court likewise approved the sale of the Central Store to Barnes & Noble.[9]

---

[6] *See* Bankruptcy Case Docket No. 224.

[7] *See* Bankruptcy Case Docket No. 404.

[8] *See* Bankruptcy Case Docket No. 440.

[9] Another Virginia educational institution, Northern Virginia Center, also actively participated in the sale of the Wallace bookstore located on its campus to Barnes & Noble.

Petitioners obtained significant benefits from Wallace's administration in chapter 11 and their participation in the court-supervised disposition of Wallace's bookstore assets. Among other things, Petitioners enjoyed the orderly transition of operations from Wallace to either Follett or Barnes & Noble without interruption of services to students at their campuses, and without the delay associated with the procedures typically required for the provisions of services to public institutions of higher education in Virginia under the Virginia Public Procurement Act. *See* Va. Code §§ 2.2-4300, *et seq.*

D. Wallace's Chapter 11 Plan and the Bankruptcy Court's Appointment of Respondent Katz to Serve as Trustee of the Estate

On May 20, 2002, the bankruptcy court confirmed Wallace's Amended Joint and Consolidated Plan of Liquidation (the "Plan").[10] *See* 11 U.S.C. §§ 1129 (providing for the confirmation of chapter 11 plans), 1141 (prescribing the effect of confirmation of a plan). Pursuant to the Plan, on May 30, 2002, the bankruptcy court appointed Respondent as Liquidating Supervisor of Wallace's bankruptcy estate. The court appointed Respondent to serve as trustee of the estate and to represent the estate; to resolve claims against the estate; to collect uncollected assets; to liquidate the estate's property; and to distribute the proceeds equitably among creditors as provided under applicable bankruptcy law. *See* 11 U.S.C. § 323(a).[11]

---

[10] *See* Bankruptcy Case Docket No. 1095.

[11] *See also* Article VI of the Plan, Bankruptcy Case Docket No. 969 (prescribing Respondent's duties).

E. The Claims-Allowance and Adjustment Process, and Petitioners' Preference Obligations

The filing of a proof of claim with the bankruptcy court – such as VMI's filing of its proof of claim in this case – implicates the Bankruptcy Code's claims-allowance and adjustment procedures. Pursuant to section 501(a) of the Code, a claim is deemed "allowed," and therefore entitled to participate in distributions from the estate, if no party in interest objects to the claim. 11 U.S.C. § 502(a). Pursuant to section 502(b), if an objection to a claim is filed, the bankruptcy court is required to resolve the objection and either allow or disallow the claim. Pursuant to section 502(d), the bankruptcy court must disallow a claim if the creditor asserting the claim owes unsatisfied obligations to the bankruptcy estate, including any "preference" obligation under section 547 of the Code. 11 U.S.C. § 502(d) ("the court shall disallow any claim of any entity. . . that is a transferee of a transfer avoidable under section . . . 547 . . . of this title, unless such . . . transferee . . . has . . . turned over any such property"); *see Keppel v. Tiffin*, 197 U.S. 356, 363-64 (1905) (explaining operation of predecessor to section 502(d)).

Section 547 governs the determination of preferences and provides that a trustee may "avoid" any transfer to a creditor that the debtor made within 90 days before the debtor's bankruptcy case that enabled the creditor to receive a larger percentage of its claim than the creditor would receive as a distribution through the bankruptcy process. 11 U.S.C. § 547(b); *see Union Bank v. Wolas*, 502 U.S. 151, 154-55 (1991); *Begier v. IRS*, 496 U.S. 53, 58 (1990). In turn, section 551 of the Code automatically preserves for the benefit of the estate a transfer avoided under section 547. 11 U.S.C. § 551 ("Any transfer avoided under section . . . 547 . . . is preserved for the benefit of the estate.").

Pursuant to section 542 of the Code, the transferee of property that may be administered as part of the estate is obligated to return the property to the estate. 11 U.S.C. § 542(a)

("an entity . . . in possession, custody, or control . . . of property that the trustee may use . . . shall deliver to the trustee . . . such property"). In turn, section 550 permits the trustee to recover the transferred property for the benefit of the estate. 11 U.S.C. § 550(a).

As this Court has observed, the preference provisions serve two purposes. First, they promote the central bankruptcy policy of equality of distribution among creditors. *Wolas*, 502 U.S. at 160-61; *Begier*, 496 U.S. at 58. Second, they discourage debt collection activity against the debtor while the debtor struggles on the verge of bankruptcy by requiring the creditor to disgorge the fruits of its collection activities. *Wolas*, 502 U.S. at 160-61.

In this case, each Petitioner received significant preferential payments from Wallace just before Wallace filed for bankruptcy and none has returned its preferential payments to the estate.[12] Accordingly, Katz objected to VMI's proof of claim under section 502(d) and commenced adversary proceedings in the bankruptcy court against Petitioners to recover the preferential payments that each received. J.A. at 2-35.[13]

---

[12] VMI received $25,595.00, J.A. at 6; New River received $65,264.00, J.A. at 33; Central received $63,387.00, J.A. at 15; and Blue Ridge received $34,054.58, J.A. at 23.

[13] Katz also asserted additional claims against Petitioners in two groups: (1) claims against VMI and Blue Ridge under section 544 of the Code and a state statute that permits the recovery of certain payments, Ky. Rev. Stat. Ann. § 378.060 (Michie 2004), and (2) claims for certain unpaid debts owed to Wallace. Katz voluntarily dismissed the first group of claims after this Court granted certiorari. Katz has moved voluntarily to dismiss the second group of claims, leaving only the preference actions. Petitioners have indicated that they may object to dismissal of the second group of claims. The dismissal of the additional claims does not affect the issues presented to this Court.

F. Disposition in the Courts Below

Petitioners moved to dismiss the four preference proceedings on the ground that the actions are barred by the doctrine of sovereign immunity. In response, Katz argued, *inter alia*, that Petitioners had waived any sovereign immunity by VMI's filing of its proof of claim. *See, e.g.*, J.A. at 45. Relying on the Sixth Circuit's decision in *Hood v. Tennessee Student Assistance Corp.*, 319 F.3d 755 (6th Cir. 2003), the bankruptcy court denied Petitioners' motion to dismiss. Petitioners appealed the bankruptcy court's denial to the district court, and Respondent again asserted his waiver argument. The district court affirmed the bankruptcy court on the basis of the Sixth Circuit's decision in *Hood*. J.A. at 44-45. Petitioners then appealed to the Court of Appeals.

While Petitioners' appeal was pending, VMI attempted to withdraw its proof of claim "to the extent the proof of claim constitutes a waiver of sovereign immunity."[14] The bankruptcy court declined to grant the motion. On May 17, 2004, the Court issued its decision in *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004). Since that time, VMI has not pursued further its motion to withdraw its proof of claim. *Cf. Bronx Brass Foundry, Inc., v. Irving Trust Co.*, 297 U.S. 230, 231-32 (1936) (affirming bankruptcy court's refusal to permit withdrawal of proof of claim). Three months after this Court issued its opinion in *Hood*, the Sixth Circuit affirmed the district court in an unpublished *per curiam* opinion. J.A. at 46-47. This appeal followed.

---

[14] VMI made two separate motions to withdraw its proof of claim, one in the adversary proceeding, Bankruptcy Case Docket No. 1632, and an amended motion in the bankruptcy case itself, Docket No. 1634.

SUMMARY OF ARGUMENT

Petitioners argue that the preference adversary proceedings brought by Katz offend Virginia's sovereign immunity. Virginia, however, waived its sovereign immunity when VMI and various other state institutions – which are considered to be Virginia for purposes of sovereign immunity – invoked the federal bankruptcy court's jurisdiction by filing proofs of claim and by participating in the case. As this Court has long recognized, a State may waive its sovereign immunity by participating through one of its agencies in a federal court proceeding, and in particular does so by filing a proof of claim with a federal bankruptcy court. So, too, in this case, Virginia has waived any claim of sovereign immunity.

Even in the absence of a waiver, Virginia cannot invoke sovereign immunity because the proceedings at issue are not brought by a private citizen of any State against one of the States. Rather, the actions are brought by the court-appointed representative of a federally created entity exercising authority under the laws of the United States and operating under the supervision of the Department of Justice. Just as a State has no immunity from a suit brought against it by the United States, Virginia has no defense of sovereign immunity to the proceedings at issue here.

In addition, the State's defense of sovereign immunity does not apply because the recovery of a preference lies within the *in rem* authority of the bankruptcy court to recover property that the State, under federal law, has no right to keep. A State has no authority to refuse the superior right of the bankruptcy estate under federal law to property that can be administered as part of the bankruptcy proceeding. Accordingly, Petitioners may be compelled to return the payments that they received.

Finally, the State's defense of sovereign immunity does not apply because, in adopting the Constitution, the States ceded

their immunity from the application of uniform federal bankruptcy rules, including those regarding title and possession of property to be administered as part of the bankruptcy estate. The recovery of preferential payments has been a part of the fabric of bankruptcy law since before the signing of the Constitution. If preferences cannot be recovered from state entities that have received them, then there is no way to enforce this critical and longstanding feature of bankruptcy law and States may disregard this aspect of bankruptcy law with impunity. This would render the federal bankruptcy law non-uniform in violation of the Constitution by, among other things, shielding from its reach state entities that manage to extract payment from a debtor before the debtor files for bankruptcy, while leaving the United States and state entities that have not received payment to abide the bankruptcy law in order to receive distributions on their claims.

ARGUMENT

A. Petitioners Have Waived Any Claim of Sovereign Immunity.

1. The Court should consider Respondent's waiver argument.

Petitioners contend that Congress lacks the authority to abrogate a State's immunity from suit through the exercise of its Article I powers, and, therefore, that section 106 of the Bankruptcy Code, which explicitly renders the States subject to certain proceedings under the Code, is unconstitutional. This Court's "settled policy," however, is to avoid the decision of constitutional issues where doing so is not necessary to the resolution of a pending case. *Nixon v. Fitzgerald*, 457 U.S. 731, 748 n.27 (1982); *see Hood*, 541 U.S. at 454-55 (citing *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885) ("[We are bound] never to anticipate a question of constitutional law in advance of the necessity of deciding it")); *Minnesota v. National Tea Co.*, 309

U.S. 551, 557 (1940). In this instance, it is unnecessary to decide the constitutional question that Petitioners raise because, whatever sovereign immunity Virginia might have had, Virginia waived its sovereign immunity when its agencies filed various proofs of claim and otherwise availed themselves of the benefits of the bankruptcy proceedings.

The Court likewise should address Respondent's waiver argument because Respondent raised it below; Petitioners have anticipated and addressed the argument in their brief; and the factual basis for the argument is in the record. *See Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 477 n.20 (1979) ("As the prevailing party, the appellee was of course free to defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals."). Even if Respondent had not raised his waiver argument below, a prevailing party is nonetheless "entitled to rely on any legal argument in support of the judgment below." *Schiro v. Farley*, 510 U.S. 222, 228-29 (1994); *see also Bennett v. Spear*, 520 U.S. 154, 167 (1997); *Dandridge v. Williams*, 397 U.S. 471, 476 n.6 (1970) ("The prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court."); *Ponte v. Real*, 471 U.S. 491, 500 (1985); *United States v. American Ry. Express Co.*, 265 U.S. 425, 435-36 (1924).

2. A state agency waives sovereign immunity by filing a proof of claim.

The Eleventh Amendment "is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity." *Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996) (internal citation omitted). It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without the sovereign's consent. *Id.* Sovereign immunity, however, is not absolute, and a State may

waive it. *Lapides v. Board of Regents*, 535 U.S. 613, 618 (2002); *see also Clark v. Barnard*, 108 U.S. 436, 447 (1883). Waiver generally may arise in one of two ways: the State may make a clear declaration in a statute or contract that it is subject to suit in federal court (waiver by consent), or the State, through an agency, may engage in conduct that surrenders the State's immunity (waiver by conduct). *Lapides*, 535 U.S. at 618; *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675-676 (1999). Whether a particular set of state laws, rules, or activities amounts to a waiver of immunity is a question of federal law. *Lapides*, 535 U.S. at 623.

Based on notions of fundamental fairness and judicial consistency, this Court has found a waiver of sovereign immunity by conduct where a State voluntarily invokes the jurisdiction of a federal court. *See Lapides*, 531 U.S. at 618-622; *Porto Rico v. Ramos*, 232 U.S. 627, 631 (1914); *Richardson v. Fajardo Sugar Co.*, 241 U.S. 44, 47 (1916); *Gunter v. Atlantic Coast Lines R. Co.*, 200 U.S. 273, 284 (1906); *Clark*, 108 U.S. at 448. This Court has specifically found a waiver by conduct where a State, through one of its agencies, filed a proof of claim in a bankruptcy case. *See Gardner v. New Jersey*, 329 U.S. 565, 574 (1947). In this instance, VMI and other Virginia agencies filed proofs of claim with the bankruptcy court, thereby invoking the bankruptcy court's jurisdiction and waiving Virginia's immunity with respect to claims adjustments and counterclaims based on the Bankruptcy Code's preference provisions.

Petitioners may argue that a state agency authorized to file a proof of claim is not authorized to waive sovereign *immunity* and therefore does not do so. Such an argument, however, confuses the two distinct methods by which a State may waive immunity (waiver by consent versus waiver by conduct), and the argument was expressly rejected in *Lapides*. In *Lapides*, the Court held that the authorized invocation of federal-court jurisdiction – even without express authority to waive sovereign immunity – is sufficient to waive the State's immunity "because

an interpretation of the Eleventh Amendment that finds waiver in the litigation context rests upon the Amendment's presumed recognition of the judicial need to avoid inconsistency, anomaly, and unfairness, and not upon a State's actual preference or desire, which might, after all, favor selective use of 'immunity' to achieve litigation advantages." 535 U.S. at 620. Moreover, VMI can hardly contend that it was unaware that the filing of a proof of claim implicates the Bankruptcy Code's claims-allowance process and the requirement that preferences be disgorged. As noted, section 502 governs the allowance of claims in bankruptcy, and section 502(d) plainly requires the disallowance of claims if preferential payments have been received and not relinquished. 11 U.S.C. § 502(d).

The Court's decision in *Gardner* leaves no doubt that a State waives sovereign immunity by filing a proof of claim. *Gardner* was a bankruptcy case in which the Comptroller of New Jersey filed a proof of claim for unpaid taxes. The trustee, on behalf of the bankruptcy estate, objected to the State's claim, and petitioned the bankruptcy court to determine either that a tendered compromise of the claim bound the State, or, alternatively, for adjudication of the amount and priority of the State's claim. In response, the State asserted sovereign immunity. *Gardner*, 329 U.S. at 571. Observing that it "is traditional bankruptcy law that he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure," this Court held that when a State voluntarily invokes the bankruptcy court's jurisdiction by filing a proof of claim, it waives any immunity that it otherwise might have had. *Id.* at 573-74.

Here, Virginia, through VMI and other arms of the State, unequivocally took steps to participate in the distribution of the assets of the estate by filing their proofs of claim, and in doing so submitted to the jurisdiction of the bankruptcy court with regard to the adjudication of their claims and any adjustment or counterclaims arising under the Bankruptcy Code. In varying degrees, each of the Petitioners also availed themselves of the

benefits of the bankruptcy proceedings by participating in the disposition of the VMI Store, the Blue Ridge Store, the New River Store, and the Central Store. Accordingly, Virginia, through its agencies, has waived any Eleventh Amendment immunity that it might otherwise have had with respect to the application of ordinary bankruptcy procedures that apply in the administration of claims, including claims adjustments and counterclaims based upon the Code's preference provisions.

3. A state agency waives the State's sovereign immunity when it files a proof of claim, and this waiver binds all "arms" of the same State.

Petitioners contend that the proofs of claim filed by VMI and other Virginia educational institutions do not waive the defense of sovereign immunity for the remaining Petitioners who did not file proofs of claim. Pet. Br. at 30 n.36. This argument, however, is unsound. Just as an agency's waiver of sovereign immunity binds the State, it must necessarily also bind the State's other agencies that act on the State's behalf.

The selective waiver of sovereign immunity that Petitioners advocate conflicts with the very nature of sovereignty. Sovereignty flows from the State, not its agencies, and state agencies have sovereign immunity only because they are "arms of the State." The waiver at issue in this case is the waiver of Virginia's immunity because, apart from the State, Petitioners have no immunity. When VMI and other state educational institutions filed proofs of claim, they waived the only immunity that exists: Virginia's immunity. Because the waiver of immunity is Virginia's immunity, there is no immunity left for Central, New River, and Blue Ridge to assert even though these agencies did not file proofs of claim. In any event, wholly apart from the filing of claims, *each* of the Petitioners also participated in the bankruptcy case, and obtained benefits as a result, which in and of itself waived the State's immunity.

The preeminent purpose of sovereign immunity is to accord a *State* the dignity that is consistent with its status as a sovereign. *Federal Mar. Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 760 (2002). When deciding whether a state agency may invoke a State's sovereign immunity, courts routinely inquire into the relationship between the agency and the State, with the relevant inquiry being whether the agency is properly "an arm of the State." *See Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 430 (1997). In this case, Petitioners assert unequivocally that they are "the Commonwealth [of Virginia] for purposes of sovereign immunity." Pet. Br. at 1 n.1. In conformity with that contention, Petitioners cannot be considered four separate and distinct sovereigns. Neither sovereign immunity nor the dignity that it is designed to safeguard can be partitioned into portions for each of Virginia's agencies independently to reserve or waive *ad hoc* as their individual or coordinated strategic litigation interests may dictate.

The Second Circuit's decision in *In re Charter Oak Assocs.*, 361 F.3d 760 (2d Cir. 2004), *cert. denied*, 125 S. Ct. 408 (2004), illustrates this principle. In *Charter Oak*, a Connecticut agency filed a proof of claim on behalf of the State against the debtor's bankruptcy estate. 361 F.3d at 763. When the bankruptcy trustee later brought an action against the State asserting the liability of a different Connecticut agency to the estate, the State argued that the filing of the proof of claim by one agency waived sovereign immunity only for that agency. *Id.* at 763-64. Citing *Lapides*, the Second Circuit held that "the fundamental driving force behind the waiver-by-litigation doctrine . . . demands that a waiver by one [agency] be deemed to extend to the other." *Id.* at 772.

A compelling reason for the rule that an agency's waiver binds the State is to prevent the selective use of immunity to achieve unfair litigation advantage. Obviously, if the particular agency that filed a proof of claim is deemed to have waived the State's sovereign immunity, but the State's other agencies are not bound by this waiver, a State could engage in endless

manipulation of its immunity. For example, the State could assign to one of its agencies the task of collecting claims in bankruptcy and participating in the bankruptcy process on behalf of the State, and assign to other agencies the task of collecting and receiving payments outside of bankruptcy. Inevitably, States would quickly become dimorphous super-creditors with the ability to obtain the full benefits of bankruptcy law without having to bear any of its burdens – all at the expense of other creditors and the central bankruptcy policy of equality of distribution. Such a selective subdivision of the State's sovereign immunity, however, is the very result that this Court rejected in *Lapides*, 535 U.S. at 620.

Virginia cannot have it both ways. Having sought and obtained the benefits of the bankruptcy process, Virginia as a whole must abide the consequences. If Virginia does not wish to be bound by ordinary bankruptcy procedures attendant to the filing of proofs of claim, then Virginia should direct its agencies to refrain from filing claims.

4. A state agency's waiver of sovereign immunity by filing a proof of claim includes waiver of sovereign immunity with respect to any preference action that the estate may have against the State or its agencies.

Petitioners' argue that any waiver of Virginia's sovereign immunity is limited to consideration of the specific claims presented in the proofs of claim, to certain compulsory counterclaims, or is capped by the amounts asserted in the claims. Pet. Br. at 22. These contentions are also without merit. Sovereign immunity is a defense to a federal court's *jurisdiction*, and not a defense to a particular claim or categories of claims. Where a State voluntarily invokes the jurisdiction of a federal court by filing a proof of claim, the form of relief sought by or against the State is not relevant to the question whether the State's sovereign immunity has been waived. *Lapides*, 535 U.S. at 620 (citing *Clark*, 108 U.S. at 477; *Gardner*, 329 U.S. at 574;

and *Gunter*, 200 U.S. at 284); *see also Regents of the Univ. of Cal.*, 519 U.S. at 430. A bankruptcy court has plain jurisdiction to allow or disallow claims, and to adjudicate counterclaims against those who have filed proofs of claim, including preference actions. 28 U.S.C. §§ 157(b)(1), 157(b)(2)(B), 157(b)(2)(C), 157(b)(2)(F). The filing of the proofs of claim in this case triggered this jurisdiction.

In addition, the preference actions are necessarily related to the claims. Petitioners' preference obligations to the estate under sections 547, 551, 542, and 550 of the Code arise because they have received transfers of property (funds) that enabled them to recover more on their claims than bankruptcy law allows. By force of section 502(d), any claims that Petitioners hold must be disallowed because of the preferences that they have received. Accordingly, in order to determine whether the claims must be allowed or disallowed, the bankruptcy court must determine whether Petitioners received preferences under section 547. In other words, the preference proceedings that Respondent initiated in this case are intimately connected with the determination of Petitioners' claims because, under applicable bankruptcy law, it is not possible to allow the claims without determining the preferences.

By operation of law, if Petitioners received avoidable preferences, they are not entitled to keep them because section 551 preserves any avoided transfer for the benefit of the estate, and section 542 directs that the avoided transfer must be returned to the estate. Once having determined that Petitioners received preferences, it follows that the bankruptcy court may direct that the funds be returned to the estate under section 550, all as a consequence of the resolution of filed claims.

As this Court has explained in considering the effect of a creditor's filing of a proof of claim on a bankruptcy court's ability to determine a preference action against the creditor, a filed proof of claim "becomes part of the claims-allowance process" that is "integral to the restructuring of the debtor-

creditor relationship through the bankruptcy court's equity jurisdiction." *Langenkamp v. Culp*, 498 U.S. 42, 45 (1990). Accordingly, the filing of a claim triggers not merely the determination of the claim, but the overall equitable process of the "allowance and disallowance of claims," and waives the creditor's Seventh Amendment right to a jury trial with respect to any subsequent preference claim brought by the estate. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 58-59 & n.14 (1989) (citing *Katchen v. Landy*, 382 U.S. 323, 336 (1966)). By analogy, just as a creditor waives its personal right to a trial by jury in a preference action when the creditor files a proof of claim, a state agency that has filed a proof of claim waives the State's sovereign immunity when the bankruptcy estate asserts that the State must return the preferences that it received.

In *Alexander v. Hillman*, 296 U.S. 222 (1935), the Court held that a federal district court in a receivership proceeding had jurisdiction to adjudicate claims for affirmative relief against parties who filed claims in the proceeding. 296 U.S. at 238. After the creditors in *Alexander* asserted their claims, the district court granted the receivers leave to file an ancillary bill to recover from the claimants certain sums that they allegedly owed to the receivership estate. *Id.* at 236. The claimants defended on the basis that they were not subject to the jurisdiction of the district court because they were citizens of a different State. *Id.* On appeal, this Court expressly rejected the contention that the claimants could invoke the district court's jurisdiction to obtain payment on their claims while denying the court's power to require them to account for what they owed to the estate. *Id.* at 241. In support of its holding, the Court relied upon the interconnected nature of the parties' claims and counterclaims, as well as upon notions of fundamental fairness and judicial economy. *Id.* at 242-43. The Court also overturned the limit that the lower court had placed on the receivers' ability to seek enforcement of only "so much of their claims as are 'purely defensive,'" and held that the district court had jurisdiction over the claimants with regard to the full amount of the receivers' claims for affirmative relief. *Id.*

Similarly, in *Clark v. Barnard*, 108 U.S. 436 (1883), the Court dealt with Rhode Island's claim of sovereign immunity in a context in which Rhode Island made a claim against a fund in federal court. The Court held that the State's appearance in federal court to claim the fund constituted a voluntary submission to federal jurisdiction "to the full extent required for [the] complete determination" of the dispute between the parties. 108 U.S. at 447-48.

As in both *Alexander* and *Clark*, the full determination of Virginia's legitimate interests in the bankruptcy estate in this case requires not only consideration of the various proofs of claim, but also the adjudication of the estate's preference claims. As a result of the invocation of the bankruptcy court's jurisdiction over the former, Petitioners must accept the consequence that they are amenable to the latter.[15]

---

[15] In support of their argument that Virginia's waiver of sovereign immunity is limited only to the amount and kind of relief requested in the proofs of claim, Petitioners cite three of this Court's decisions: *United States v. United States Fid. & Guar. Co.*, 309 U.S. 506 (1940); *United States v. Shaw*, 309 U.S. 495 (1940); and *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe*, 498 U.S. 505 (1991). Pet. Br. at 22 & n.25. As this Court pointed out in *Lapides*, however, these three cases are inapposite to the issue as they did not involve the Eleventh Amendment but concerned special circumstances relating to the United States' sovereign interests which were not at issue in that case and, likewise, are not at issue here. *Lapides*, 535 U.S. at 623.

B. Petitioners Cannot Invoke Sovercign Immunity Because the Adversary Proceedings Were Brought By the Court-Appointed Representative of A Federally Created Entity That Falls Under the Supervision of the Department of Justice.

1. The Court should consider Respondent's "federal entity" argument.

If it has not been waived, the defense of sovereign immunity is nonetheless unavailable to Petitioners because the plaintiff in the adversary proceedings at issue is the court-appointed representative of a federally created bankruptcy estate asserting federal claims arising under the federal Bankruptcy Code under the supervision of the Department of Justice.

Petitioners may contend that Respondent is precluded from asserting this argument on the ground that it was not raised or addressed below. This contention, however, is erroneous and the Court should consider Respondent's argument for three reasons. First, Respondent argued below that Petitioners have no defense of sovereign immunity due to the special nature of bankruptcy proceedings, and Respondent's "special entity" argument is not a separate claim, but simply an argument in support of his claim. *See Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 245 n.2 (2000) ("'Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'") (quoting *Yee v. Excondido*, 530 U.S. 519, 534 (1992)); *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (holding that party may present "new argument to support what has been his consistent claim").

Second, the issue is "subsidiary" to the ultimate question of the constitutionality of section 106 because the issue is an integral part of the analysis and is essential to its intelligent resolution. *See Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 75 n.13

(1996) (where resolution of issue is a "predicate to an intelligent resolution of the question presented . . . [it is properly] one 'fairly included' within the question presented"); *Missouri v. Jenkins*, 515 U.S. 70, 84 (1995) (issue "subsidiary to the ultimate inquiry" is "fairly included in the question presented") (internal quotation marks and citation omitted); *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994); *see also Procunier v. Navarette*, 434 U.S. 555, 559 (1978) ("our power to decide is not limited by the precise terms of the question presented"). Section 106 cannot be unconstitutional if it authorizes nothing more than what the Eleventh Amendment permits. If the Eleventh Amendment permits the representative of a bankruptcy estate to pursue preference actions against Petitioners, then Petitioners' claim of unconstitutionality must fail. Because only trustees may pursue preference actions, the issue is integral to the question.

Third, the question of sovereign immunity is one of jurisdiction and questions of jurisdiction may be raised at any time, *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230-31 (1990) (considering standing issue not raised or addressed below that implicated federal jurisdiction because "every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review.") (internal quotation marks and citation omitted).

2. The bankruptcy estate is a special entity to which the Eleventh Amendment does not apply.

The Eleventh Amendment provides that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. Although, by its literal terms, the amendment "restrict[s] only the Article III diversity jurisdiction of the federal courts," *Seminole Tribe*, 517 U.S. at 54, the Court has concluded that the text of the amendment is not controlling. Instead, the amendment reflects broader principles of sovereign immunity, *Alden v.*

Maine, 527 U.S. 706, 715-17 (1999). Thus, the Court has held that the amendment shields States from suits by their own private citizens, *Hans v. Louisiana*, 134 U.S. 1 (1890); by foreign countries, *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934); and by Indian tribes, *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991).

On the other hand, "nothing in [the Eleventh Amendment] or any other provision of the Constitution prevents or has ever been seriously supposed to prevent a State's being sued by the United States." *United States v. Mississippi*, 380 U.S. 128, 140-141 (1965). The same is true for suits between States. As the Court recently observed, the Constitution contemplates suits "among the members of the federal system as an alternative to extralegal measures." *Alden*, 527 U.S. at 755-756.

This Court first addressed whether the United States may sue a State in *United States v. Texas*, 143 U.S. 621 (1892), a dispute over the ownership of real property claimed by both sovereigns. Congress, by statute, had directed the Attorney General to commence suit on behalf of the United States "in order that the rightful title to said land may be finally determined." 143 U.S. at 622. Texas claimed that the federal government lacked constitutional authority to sue a State in federal court. This Court, however, was unwilling to assume that the Constitution "overlooked the possibility that controversies, capable of judicial solution, might arise between the United States and some of the States," particularly where the Constitution makes other inter-sovereign controversies cognizable in federal court. *Id.* at 644-45. Acknowledging the federal jurisdictional limits represented by the Eleventh Amendment, the Court nevertheless interpreted the Constitution as inherently subjecting the States to "the suit of the government established for the common and equal benefit of the people of all the States." *Id.* at 646.

This case presents a close variant on the well-settled principle that States cannot claim sovereign immunity as a

defense to an action brought by or on behalf of the federal government. Here, Respondent is the court-appointed official responsible for representing the real party in interest – the federally created bankruptcy estate that resides *in custodia legis* with the federal bankruptcy court. The bankruptcy estate is obviously not a private citizen. Nor is it a citizen of any State. Rather, it is a creature of federal law that resides exclusively in the custody of the United States.

Nor is a bankruptcy trustee a private litigant, but, rather, is an official of the United States. In the performance of his or her duties, a bankruptcy trustee acts as an agent of the bankruptcy court. *See* 11 U.S.C. §§ 323, 324, 327, 330, 1104; *see also River Prod. Co. v. Webb (Matter of Topco, Inc.)*, 894 F.2d 727 (5th Cir. 1990). Further, bankruptcy trustees are subject to the considerable supervision of the United States Trustee, who is a Department of Justice official and who is also authorized to serve as a trustee in bankruptcy cases. *See* 28 U.S.C. § 586; *Balser v. Department of Justice*, 327 F.3d 903, 910 (9th Cir. 2003); *Joelson v. United States*, 86 F.3d 1413, 1418 (6th Cir. 1996). By virtue of their office as agents of the federal court, bankruptcy trustees enjoy qualified immunity from suit similar to other governmental officials,[16] and, in at least one respect, enjoy one type of protection from suit greater than that of most other federal officers.[17]

---

[16] *See, e.g., Curry v. Castillo (In re Castillo)*, 297 F.3d 940, 949-52 (9th Cir. 2002), *amended by*, Nos. 00-55846, 00-55851, 2002 U.S. App. LEXIS 25729 (9th Cir. Sept. 6, 2002), (discussing bankruptcy trustee's immunity from suit); *Gregory v. United States Bankr. Court*, 942 F.2d 1498, 1500-01 (10th Cir. 1991) (holding trustee entitled to absolute immunity with respect to certain official functions).

[17] *See, e.g., In re Linton*, 136 F.3d 544, 546 (7th Cir. 1998); *Lebovits v. Scheffel (In re Lehal Realty Assocs.)*, 101 F.3d 272 (2d Cir. 1996); *Allard v. Weitzman (In re DeLorean Motor Co.)*, 991 F.2d 1236, 1240 (6th Cir. 1993); *Vass v. Conron Bros. Co.*, 59 F.2d 969, 970 (2d Cir.

Apart from his duties to the estate and to the bankruptcy court, Respondent has no individual stake in the outcome of this case.[18] Rather, the preference proceedings at issue were instituted on behalf of the estate for the collective benefit of creditors, including various other governmental entities. Although the estate in this case is obviously not the United States itself, it is also not a private citizen, a citizen of any State, or a citizen of a foreign State. As a federally created instrumentality of the United States, the bankruptcy estate should enjoy the same privilege of suit as the United States with respect to federal causes of actions arising under the Bankruptcy Code that are necessary to fulfill the critical functions of the Code.

The Court's decisions in *Blatchford* and *Alden* are not to the contrary. Both involved suits by private individuals seeking to enforce their own personal rights. In contrast, this case involves the pursuit of a federally created cause of action by an instrumentality of the United States. Neither *Blatchford* nor *Alden* addresses this situation. On the contrary, *Blatchford* belongs to the category of cases in which the Court has required proof that a federal sovereign interest, or federal quasi-sovereign interest, is actually at stake when a suit appears to benefit only private persons. 501 U.S. at 779-87. That concern has no relevance here. The preference proceedings were instituted to benefit the estate, a federal entity, in order to fulfill the federal policies of the Bankruptcy Code.

1932). In each of these cases, the court applied the rule referred to as the "Barton doctrine." The Court in *Barton v. Barbour*, 104 U.S. 126, 127 (1881), stated that "[i]t is a general rule that before suit is brought against a receiver[,] leave of the court by which he was appointed must be obtained."

[18] Disinterest is a requirement for appointment as a bankruptcy trustee. 11 U.S.C. § 1104(b); *see also Wolf v. Weinstein*, 372 U.S. 633, 651 (1963).

The Court's decision in *Smith v. Reeves*, 178 U.S. 436 (1900), is also not to the contrary. *Smith* involved the federal court receivership of the Atlantic and Pacific Railroad Company, a federally chartered corporation. 178 U.S. at 436-37. The receiver commenced a suit against the treasurer of California under a *state* statute permitting the recovery in state court of taxes improperly collected by the State. *Id.* at 437. The Court concluded that the receiver was required to pursue the action in state court, rather than in federal court, on the ground that the State had only consented to be sued in its own court. *Id.* at 441. This case presents a different issue not addressed in *Smith*: whether a trustee acting on behalf of a federally created bankruptcy estate may enforce an action arising under *federal* law for which the trustee has no alternative state court forum or remedy. *Compare Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824) (holding federal jurisdiction appropriate notwithstanding Eleventh Amendment in federally chartered bank's suit against treasurer of Ohio where rights asserted were founded on integral parts of federal law that created bank).

The Court has recognized that the Eleventh Amendment is not a bar to suits by the United States seeking to enforce or protect governmental, or quasi-governmental interests. For example, notwithstanding the Eleventh Amendment, the federal government may sue a State in federal court, or one State may sue another in federal court, for relief that benefits private parties provided the litigation also serves larger sovereign goals. *See North Dakota v. Minnesota*, 263 U.S. 365, 375-76 (1923) (holding that one State can sue another "to protect the general comfort, health or property rights of its inhabitants"). So long as "sovereign or quasi-sovereign interests are implicated," and the sovereign "is not merely litigating as a volunteer the personal claims of its citizens," the Eleventh Amendment does not bar the claim. *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976) (*per curiam*); *see also Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 600-01 (1982). Although "neither an exhaustive formal definition nor a definitive list of qualifying interests can be presented in the abstract," the Court has focused

on such considerations as the subject matter of the suit (e.g. the general well-being of the sovereign's citizenry), the sovereign's ability "to address [the asserted injury] through its [own] sovereign lawmaking powers," and the sovereign's interest "in assuring that the benefits of the federal system are not denied to its general population." *Snapp*, 458 U.S. at 607-608.

Similar sovereign and quasi-sovereign interests of the United States are at work when a bankruptcy trustee pursues a federal preference proceeding. In particular, the trustee seeks to promote equality of distribution among all creditors (including governmental creditors), and discourage debt collection activities against debtors struggling on the verge of bankruptcy. Congress has chosen a judicial officer of the bankruptcy court supervised by an official of the Department of Justice to fulfill these policies for the benefit of the federally created bankruptcy estate and the public interest. Accordingly, the matter is a close variant of a suit by the United States and the Court should conclude that the Eleventh Amendment poses no bar to its pursuit in this case.

C. Sovereign Immunity Is Not Available to Bar the Bankruptcy Court's *In Rem* Jurisdiction Over Property that Should Be Returned to the Bankruptcy Estate.

1. The Court should consider Respondent's *in rem* argument.

This Court has long recognized that state and federal officials may not retain property, including funds, that they have no right to keep under federal law. Under the Fifth and Fourteenth Amendments, this Court has not hesitated to require monetary relief for the retention of property taken without just compensation, and clearly the Eleventh Amendment poses no bar to such a remedy. Separate and apart from this jurisprudence, the Court has also long recognized the *in rem* rule that a federal court may direct the relinquishment of property (including funds) that a federal or state agency has no right to

retain under federal law. In this case, Respondent seeks *in rem* to recover property (funds) that Petitioners have received but have no right to keep under federal bankruptcy law. Bankruptcy courts must possess, and be able to exercise, a comprehensive *in rem* authority over property of the kind at issue in this case because if they are denied this power then the essential aims of the Bankruptcy Code would be repeatedly thwarted. For the reasons noted above with respect to Respondent's waiver and federal entity arguments, the Court should consider Respondent's *in rem* argument.

2. Bankruptcy courts possess broad *in rem* authority to marshal the assets of an estate and adjust the rights of creditors.

This Court has observed that bankruptcy proceedings are fundamentally *in rem* in nature, and that, as noted, upon commencing a bankruptcy case, the debtor's property resides fully in the custody of the bankruptcy court. *Straton v. New*, 283 U.S. 318, 320-21 (1931); *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U.S. 300, 306-07 (1911); *see also Hood*, 541 U.S. at 448 (discussing bankruptcy court's *in rem* jurisdiction). The *in rem* nature of bankruptcy proceedings extends to the critical bankruptcy functions of marshalling an insolvent debtor's assets and the adjustment and payment of claims against those assets. *Straton*, 283 U.S. at 320-21 ("The purpose of the Bankruptcy Act . . . is to place the property of the bankrupt, whereever [sic] found, under the control of the court, for equal distribution among the creditors."); *see also Young v. Higbee Co.*, 324 U.S. 204, 210 (1945) ("historically one of the prime purposes of the bankruptcy law has been to bring about a ratable distribution among creditors of a bankrupt's assets").

A bankruptcy court cannot perform its critical functions of marshalling the debtor's assets and ensuring equality of distribution among creditors if individual creditors, including governmental units, are free to "opt out" of the process, ignore the substantive rules of bankruptcy law, and evade the exclusive

jurisdiction of the bankruptcy court. A governmental unit may not assert sovereign immunity to circumvent the exercise of essential bankruptcy jurisdiction because, if it could, there would be little left to that jurisdiction. In bankruptcy, unless all creditors, including "those cloaked in the mantle of sovereign immunity," are subject to the jurisdiction of the bankruptcy court, bankruptcy's collective mechanism for resolution simply could not operate. *See Irving Trust Co.*, 288 U.S. at 333.

These principles underlie this Court's analyses in *Irving Trust* and *Whiting Pools*, and the Court's recent analysis in *Hood*. In *Irving Trust* the Court observed that, if a State could avoid the bankruptcy procedures governing the resolution of claims, "estates could not be promptly closed." *Irving Trust*, 288 U.S. at 331. To solve this problem, Congress has the right to require all those interested in the debtor's estate, including governmental units, to appear and assert their claims. *Id.* at 332.

More broadly, in order to secure the efficient administration of bankruptcy estates, Congress has the right to bestow exclusive jurisdiction in a single tribunal over the administration of the estate, and the determination and payment of claims. *Irving Trust*, 288 U.S. at 332. To effectuate this power, it has long been recognized that, when a federal court takes possession of all of the assets of the debtor, that court's jurisdiction over the assets, and all claims to them, is exclusive of all other courts. *Id.* at 332-33. Drawing these principles together, the Court concluded in *Irving Trust*:

> The Federal government possesses supreme power in respect of bankruptcies. If a state desires to participate in the assets of a bankrupt, she must submit to appropriate requirements by the controlling power; otherwise, orderly and expeditious proceedings would be impossible and a fundamental purpose of the Bankruptcy Act would be frustrated.

Id. at 333 (citation omitted).

In *Whiting Pools*, the Court conducted a similar analysis in considering the *in rem* authority of the bankruptcy court over property of the debtor that the IRS had seized immediately prior to the debtor's commencement of its bankruptcy case. The Court observed that, in defining the boundaries of the bankruptcy estate, Congress included within those boundaries not only property in the debtor's possession at the time of the bankruptcy filing, but also "any property made available to the estate by other provisions of the Code." *Whiting Pools*, 462 U.S. at 205. The Court observed that "[s]everal of these provisions bring into the estate property in which the debtor did not have a possessory interest at the time the bankruptcy proceeding commenced" and specifically listed section 547 as an example, noting "[t]hese sections permit the trustee to demand the turnover of property that is in the possession of others if that possession is due to . . . a preferential transfer." *Id.* at 205 & n.10; *see also Begier*, 496 U.S. at 58 ("'property of the debtor' subject to the preferential transfer provision is best understood as that property that would have been part of the estate had it not been transferred before the commencement of bankruptcy proceedings").

As the Court reasoned, unless the estate can recover and make use of the debtor's various interests in property, the essential purposes of bankruptcy would be frustrated. *Whiting Pools*, 462 U.S. at 203 (noting that, without access to the debtor's property, reorganization would not be possible). Accordingly, the Court held that property belonging to the estate, but in the possession of the government, must be turned over for administration in accordance with applicable bankruptcy procedures. *Id.* at 211-12.

In *Hood*, the Court continued this line of analysis in considering the *in rem* authority of the bankruptcy court over the debtor's effort to discharge an obligation owing to a state agency. Citing *Irving Trust*, the Court observed that "States, whether or not they choose to participate in the proceeding, are bound by a bankruptcy court's discharge orders no less than other creditors." *Hood*, 541 U.S. at 448. Similarly, citing *Van*

Huffel v. Harkelrode, 284 U.S. 225, 228-29 (1931) – a case in which the Court approved the bankruptcy court's sale of property free and clear of a State's tax lien – the Court stated that "our cases indicate that the exercise of [a bankruptcy court's] *in rem* jurisdiction to discharge a debt does not infringe state sovereignty." *Hood*, 541 U.S. at 448. Accordingly, the Court affirmed the bankruptcy court's *in rem* determination of the debtor's discharge. *Id.* at 451.

3. The administration of the Code's preference avoidance and recovery rules lies within the bankruptcy court's *in rem* authority and does not constitute a suit for money damages.

A proceeding to avoid and recover a preferential transfer under sections 547, 542, 550, and 551 of the Bankruptcy Code is an *in rem* proceeding to determine the bankruptcy estate's title to property and marshal the property to facilitate the estate's administration. As this Court explained in *Gardner*, the *in rem* jurisdiction of the bankruptcy court over property of the estate "is not limited to the prevention of interference with the use of the property by the trustee; it 'extends also to the adjudication of questions respecting title.'" *Gardner*, 329 U.S. at 577 (quoting *Ex Parte Baldwin*, 291 U.S. 610, 616 (1934) and *Thompson v. Texas Mexican Ry. Co.*, 328 U.S. 134, 140 (1946)). Applying this longstanding rule, the Court concluded in *Gardner* that the bankruptcy court had jurisdiction over property in which the State of New Jersey claimed a superior interest. *Gardner*, 329 U.S. at 578; *see also Straton*, 283 U.S. at 322 (holding bankruptcy court that avoids lien "has jurisdiction to administer the property regardless of the lien"); *Van Huffel*, 284 U.S. at 228 (observing bankruptcy court's obligation to "reduce to money and distribute the estates of bankrupts, *and to determine controversies with relation thereto*") (emphasis added).

Under section 547, the relevant *in rem* inquiry is likewise one of title. By its terms, section 547 operates to avoid the debtor's pre-petition transfer of property, thus defeating the

transferee's title to the property. Specifically, section 547 provides that "the trustee may *avoid* any transfer of an interest of the debtor in property" if the criteria of section 547 apply. 11 U.S.C. § 547 (emphasis added). Application of section 547 is little different than the avoidance of a State's lien on the debtor's property at issue in *Van Huffel* or *Straton*: each involves simply a determination of the State's interest in property that may be administered as part of the bankruptcy estate.

Under sections 542, 550, and 551, the relevant *in rem* procedure involves marshalling property that belongs to the estate and that may be administered as part of the estate. To begin with, section 551 provides that, if a transfer is avoided under section 547, the transfer is automatically preserved for the benefit of the estate. 11 U.S.C. § 551 ("Any transfer avoided under section . . . 547 . . . *is preserved for the benefit of the estate*.") (emphasis added). In other words, once a transfer is avoided, title to the *res* vests automatically in the estate.

In turn, section 542 directs that anyone in possession of property of the estate must turn over the property to the trustee. 11 U.S.C. § 542(a) ("[A]n entity . . . in possession, custody, or control . . . of property that the trustee may use, sell, or lease . . . shall deliver to the trustee . . . *such property*." (emphasis added). Likewise, section 550 authorizes the bankruptcy court to require the transferee of an avoided transfer to relinquish the property to the estate. 11 U.S.C. § 550(a) ("to the extent that a transfer is avoided under section . . . 547 . . . the trustee may recover, for the benefit of the estate, *the property transferred*") (emphasis added). Application of these provisions is little different than the procedure recognized in *Whiting Pools* that a governmental agency is obligated under section 542 to return property that it had seized to the estate on account of a tax claim.

In this case, of course, the property in question is specific funds that Wallace transferred to Petitioners. The fact that the property is funds, however, does not defeat the *in rem* nature of the proceedings nor does it convert the matter into a suit for

money damages. The nature of the relief requested is controlling. Here Respondent seeks the recovery of the property that was transferred, which happens to be funds, not damages for wrongful retention of the property. This Court has previously approved this very distinction in *Bowen v. Massachusetts*, 487 U.S. 879, 893-96 (1988). There the Court observed that "[t]he fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as 'money damages.'" 487 U.S. at 893. The Court explained that "[d]amages are given to the plaintiff to *substitute* for a suffered loss, whereas specific remedies are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled." *Id.* at 895 (internal quotation marks and citation omitted); *see also Aetna Cas. & Sur. Co. v. United States*, 71 F.3d 475, 478 (2d Cir. 1995) ("[Plaintiff's suit to recover funds] is not for damages to compensate for the government's failure to perform a duty. . . . Rather it seeks to require the government to perform its duty – that is, to pay Aetna funds held by the government . . . ."). By its terms, the remedy that section 550 offers and that is at issue here is the specific recovery of property.[19]

---

[19] Respondent's complaints in this case request both recovery of the property transferred and recovery of the value of the property transferred. J.A. 9, 16, 26, and 34; *see* 11 U.S.C. § 550(a) (allowing the recovery of the property transferred, or, with court authorization, "the value of such property"). In the event Petitioners have waived sovereign immunity, or Respondent's pursuit of relief is not barred by the Eleventh Amendment for reasons other than Respondent's *in rem* argument, Respondent is entitled to either form of relief. To the extent that the Court determines that the exercise of *in rem* jurisdiction in bankruptcy permits only the recovery of the particular property in question under the Eleventh Amendment, Respondent would amend and limit his complaints to seek only the property transferred.

4. The bankruptcy court may recover a preferential transfer from a State in the exercise of its *in rem* authority, and the Eleventh Amendment does not apply.

A bankruptcy court has no authority to surrender its *in rem* jurisdiction over the administration of the estate. *See Isaacs v. Hobbs Tie & Timber Co.*, 282 U.S. 734, 739 (1931) ("[A] court of bankruptcy itself is powerless to surrender its control of the administration of the estate."). Likewise, State officials have no authority – and, critically, no defense of sovereign immunity – to refuse the superior claim of the bankruptcy estate to property that can be administered as part of the federal bankruptcy proceeding. Certainly Petitioners had the right to collect debts from Wallace before Wallace filed for bankruptcy. But state law debt-collection procedures, and the rights that they bestow, must yield to the requirements of the governing Bankruptcy Code. *See Perez v. Campbell*, 402 U.S. 637, 649 (1971) (invalidating under the Supremacy Clause a state statute enforced by a state agency that provided for the recovery of tort claims in violation of the Bankruptcy Act's discharge provisions); *Van Huffel*, 284 U.S. at 228 (holding that realization on state tax lien "must yield" to the requirements of bankruptcy law); *see also International Shoe Co. v. Pinkus*, 278 U.S. 261, 265 (1929); *Cohens v. Virginia*, 19 U.S. 264, 414 (1821).

It cannot be otherwise. Governmental units, particularly state tax authorities, are pervasive creditors in bankruptcy proceedings. If governmental agents need not return preferential payments to the bankruptcy estate, then the fundamental aims of bankruptcy law would be thwarted. *See Hoffman v. Connecticut Dep't of Income Maint.*, 492 U.S. 96, 110 (1989) (Marshall, J., dissenting) ("[If the States need not adhere to the preference rules,] any State owed money by a debtor with financial problems will have a strong incentive to collect whatever it can, as fast as it can, even if doing so pushes the debtor into bankruptcy. Ordinary creditors will soon realize that State can

receive more than their fair share; the very existence of this governmental power will cause these other creditors, in turn, to increase pressure on the debtor."). Accordingly, just as state officials must abide other bankruptcy procedures, they must likewise abide the preference rules.

This Court has long recognized an exception to the doctrine of sovereign immunity for actions to recover property (including money) in the hands of a State official where, under applicable federal law, the State or its agent has no lawful right to retain possession. Under this exception, the Court has recognized the right of a federal court to determine not only questions of title, but also decree surrender of the property.

For example, in *Osborn v. Bank of the United States*, 22 U.S. 738 (1824), the Court approved an action brought by a federally chartered bank to recover funds wrongfully seized by officials of the State of Ohio. In concluding that the action could proceed, the Court explained: "It was proper, then, to make a decree against the defendants in the Circuit Court, if the law of the State of Ohio [directing the seizure of the bank's property] be repugnant to the constitution, or to a law of the United States made in pursuance thereof, so as to furnish no authority to those who took, or to those who received, the money for which this suit was instituted." 22 U.S. at 859; *see also United States v. Peters*, 9 U.S. 115, 139-40 (1809) (directing the return of property to its rightful owner and stating that "it certainly can never be alleged, that a mere suggestion of title in a state to property, in possession of an individual, must arrest the proceedings of the court, and prevent their looking into the suggestion, and examining the validity of the title").

Similarly, in *United States v. State Bank*, 96 U.S. 30 (1877), the United States came into possession of $480,000 in currency belonging to a bank owing to the misconduct of one of the federal government's treasury officers. The funds were transferred to the federal Treasury in Washington. In affirming the decision of the court of claims requiring that the funds be

returned to their rightful owner, the Court explained that the right of possession by the United States could be avoided: "[The] doings [of the treasury officer as agent for the United States in receiving the funds] were vitiated by the underlying dishonesty, and could confer no rights upon [the United States]." 96 U.S. at 36; *see Bull v. United States*, 295 U.S. 247, 261 (1935) (clarifying that the exception to immunity discussed in the *State Bank* case does not turn on the participation of the sovereign in any fraud or deceit); *see also Land v. Dollar*, 330 U.S. 731, 738 (1947) (holding that private individuals could maintain an action against officials of the United States Maritime Commission for stock that the officials were alleged to have wrongfully retained; stating "[a]nd where they unlawfully seize or hold a citizen's realty or chattels, recoverable by appropriate action at law or in equity, [the private citizen] is not relegated to the Court of Claims to recover a money judgment"); *Sante Fe Pac. R.R. Co. v. Payne*, 259 U.S. 197, 198-200 (1922); *Ex Parte Young*, 209 U.S. 123, 158 (1908); *Smith v. Reeves*, 178 U.S. 436, 439 (1900) ("[T]he settled doctrine of this court is that the question of possession does not cease to be a judicial question – as between the parties actually before the court – because the defendant asserts or suggests that the right of possession is in the state of which he is an officer or agent."); *Tindal v. Wesley*, 167 U.S. 204, 221 (1897) (upholding property owner's recovery and stating that "the eleventh amendment gives no immunity to officers or agents of a state in withholding the property of a citizen without authority of law"); *Noble v. Union River Logging R.R. Co.*, 147 U.S. 165, 172, 176 (1893); *United States v. Lee*, 106 U.S. 196, 219-20 (1882); *Meigs v. M'Clung's Lessee*, 13 U.S. 11, 18 (1815).

In *Florida v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982) (plurality), a party claiming rights to the shipwreck *Atocha* commenced an *in rem* admiralty proceeding regarding the wreck. Prior to the proceeding, certain artifacts from the wreck had been transferred to an agency of the State of Florida. The district court ordered the items turned over to the custody of the court. This Court affirmed, concluding that "[t]he Eleventh

Amendment . . . did not bar the process issued by the District Court to secure possession of the artifacts of the *Atocha* held by the named state officials." 458 U.S. at 699.

More recently, in *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998), the Court reviewed extensively its decision in *Treasure Salvors* and considered whether a federal court sitting in admiralty could determine the claim of a State without its consent to property (the shipwreck *Brother Jonathan*) in the custody of the court. Citing *Tindal* and other precedents that permitted the determination of title to property over which the federal court exercises *in rem* authority, the Court concluded that a federal court in the exercise of its *in rem* admiralty jurisdiction may determine the interests of the various parties, including the State: "[W]e conclude that the Eleventh Amendment does not bar federal jurisdiction over the *Brother Jonathan* and, therefore, that the District Court may adjudicate DSR's and the State's claims to the shipwreck." 523 U.S. at 507-08.

Read together, *Treasure Salvors* and *Deep Sea* reaffirm the principles established in such cases as *State Bank*, *Bull*, *Lee*, *Noble*, *Tindal*, *Osborn*, *Land*, and *Sante Fe* that a federal court applying federal law (1) may require the turnover of property from a State agency in cases in which the agency's retention of the property is in violation of federal law; and (2) may adjudicate all interests in the property in the exercise of its *in rem* jurisdiction over the property in question. These principles apply with equal force in bankruptcy.

Citing *Deep Sea*, this Court observed in *Hood* that, notwithstanding the Eleventh Amendment, "States . . . may still be bound by some judicial actions without their consent." *Hood*, 541 U.S. at 446. Observing further that "[b]ankruptcy courts have exclusive jurisdiction over a debtor's property, wherever located, and over the estate," *id.* at 447, the Court determined that "[a] bankruptcy court's *in rem* jurisdiction permits it 'to determin[e] all claims that anyone, whether named in the action or not, has to the property or thing in question,'" *id.* at 448

(quoting 16 James Wm. Moore, et al., MOORE'S FEDERAL PRACTICE § 108.70[1], p. 108-106 (3d ed. 2004)). Once again citing *Deep Sea*, the Court stated: "Although both bankruptcy and admiralty are specialized areas of the law, we see no reason why the exercise of the federal courts' *in rem* bankruptcy jurisdiction is more threatening to state sovereignty than the exercise of their *in rem* admiralty jurisdiction." *Hood*, 541 U.S. at 451.

In this case, Respondent seeks from Petitioners recovery of property that Wallace transferred to them. In exchange, Petitioners are entitled to assert claims against the bankruptcy estate for the preferences that they return, and may receive distributions from the estate on account of their claims. *See* Fed. R. Bankr. P. 3002(c)(3). The fact that Petitioners are denied the benefit of certain property that they are not entitled to retain does not violate the Eleventh Amendment.

The Court's decision in *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992) is not to the contrary. In *Nordic Village*, the Court considered the question whether the predecessor statute to current section 106 of the Bankruptcy Code established an unequivocal textual waiver of the sovereign immunity of the United States with respect to a trustee's pursuit of a transfer made to the IRS. 503 U.S. at 31. Concluding that it did not, the Court then considered the argument whether the trustee's pursuit of a claim for *money damages* could be sustained under the bankruptcy court's *in rem* jurisdiction. *Id.* at 38. Observing that the trustee sought to recover "a sum of money, not 'particular dollars,'" the Court stated that the premise for an *in rem* argument was missing because the trustee's claim did not focus on any "*res*." *Id.* (citations omitted). In the present case, the argument is focused quite differently. Respondent invokes the *in rem* jurisdiction of the bankruptcy court to recover under section 550 "the property transferred." 11 U.S.C. § 550(a). This Court has approved the recovery of funds from state officials on an *in rem* basis, and the relief that

Respondent seeks in this case is not barred by principles of sovereign immunity.[20]

Moreover, an order requiring state officials to perform some duty does not violate principles of sovereign immunity simply because the State may incur some expense arising from compliance with a federal court order. *See Edelman v. Jordan*, 415 U.S. 651, 668 (1974); *see also Missouri v. Jenkins*, 491 U.S. 274, 290 (1989) (O'Connor, J.) (concurring in part with award of attorneys' fees against State and stating that "[t]he Eleventh Amendment does not, of course, provide a State with across-the-board immunity from all monetary relief. Relief that 'serves directly to bring an end to a violation of federal law is not barred by the Eleventh Amendment even though accompanied by a substantial ancillary effect' on a State's treasury") (quoting *Papasan v. Allain*, 478 U.S. 265, 278 (1986)). In this case, Respondent's request for *in rem* relief in the form of requiring turnover of funds that Petitioners received but cannot retain is of the same character and is a type of permissible monetary relief.

5. Respondent is entitled to recover the relevant funds from Petitioners even if Petitioners have disbursed funds from their accounts.

The fact that Petitioners may have disbursed funds from their respective accounts does not prevent Respondent from recovering the funds in question. In circumstances such as these, the law deems that, where money belonging to one entity is transferred to a second entity who must return it, and the second entity disburses the money from its account, the second entity is

[20] As the Court also explained in *Hood*, the fact that the bankruptcy court makes use of a summons and complaint to administer its *in rem* jurisdiction is not controlling. 541 U.S. at 453 ("Thus, whether an *in rem* adjudication in a bankruptcy court is similar to civil litigation in a district court is irrelevant."). What matters is the nature of the proceeding. *Id.* at 453-54.

considered to have expended its own money rather than the money of the rightful owner and the rightful owner's money is still considered to be held by the disbursing party. *See, e.g., Aetna Cas. & Sur. Co.*, 71 F.3d at 479 ("if an agency has a legal obligation to pay money to a party, that duty does not disappear simply because the money was paid in error to the wrong person."). In any event, to the extent that there is any question regarding the adequacy of Respondent's *in rem* remedy in this case, this may be considered upon remand.

D. By Constitutional Design, the States Have No Sovereign Immunity to a Bankruptcy Court's *In Rem* Bankruptcy Jurisdiction.

Congress's authority to enact bankruptcy legislation is set forth in the Bankruptcy Clause as follows: "The Congress shall have Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." U.S. CONST., art. I, § 8, cl. 4 (the "Bankruptcy Power"). Pursuant to its Bankruptcy Power, Congress has provided for the abrogation of a State's sovereign immunity in section 106(a) of the Bankruptcy Code in the application of sections 547, 542, 551, and 550. 11 U.S.C. § 106(a)(1) ("Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following: . . . Sections . . . 542, . . . 547, . . . 550, 551."). In *Seminole Tribe*, this Court established a two-prong test to determine whether Congress has validly abrogated a State's sovereign immunity: (1) whether Congress unequivocally expressed its intent to abrogate the sovereign immunity; and (2) whether Congress acted "pursuant to a valid exercise of power." 517 U.S. at 55. Both prongs are satisfied in this case.

1. Congress has unmistakably indicated its intent to abrogate sovereign immunity in the application of sections 547, 542, 550, and 551 under section 106.

In its decision in *Hood*, the Sixth Circuit held that Congress unequivocally expressed its intent to abrogate state sovereign immunity in enacting section 106 of the Code, thereby satisfying the first prong of the *Seminole Tribe* analysis. *Hood*, 319 F.3d at 762. This point is not in dispute.

2. In the exercise of its Bankruptcy Power, Congress has a unique and comprehensive authority that includes the ability to bind States to critical aspects of bankruptcy proceedings – including the preference rules.

The Court has long recognized that the authority to restructure relations between insolvent debtors and their creditors lies at the heart of the federal bankruptcy power. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 71 (1982) (plurality) (the restructuring of debtor/creditor relations lies "at the core of the federal bankruptcy power"). The Court has also long recognized that, as part of the uniformity principle embedded in the Bankruptcy Clause, the scope of the Bankruptcy Power necessarily encompasses a comprehensive authority over the creation of the bankruptcy estate, the marshalling of property of the estate, the determination of title to property that may be included as part of the estate, the recovery of property to be included in the estate, the discharge of the debtor, and the ratable distribution of the estate.

As Chief Justice Marshall wrote for the Court in first discussing the Bankruptcy Clause in *Sturges v. Crowninshield*, 17 U.S. 122 (1819): "The peculiar terms of the grant certainly deserve notice. Congress is not authorized merely to pass laws,

the operation of which shall be uniform, but to establish uniform laws on the subject throughout the United States." 17 U.S. at 193-94. As the Court subsequently explained in *Acme*: "It is the purpose of the bankruptcy law, passed in pursuance of the power of Congress, to establish a uniform system of bankruptcy throughout the United States, to place the property of the bankrupt under the control of the court, wherever it is found, with a view to its equal distribution among the creditors." *Acme*, 222 U.S. at 307; *see also Pinkus*, 278 U.S. at 265 ("The power of Congress to establish uniform laws on the subject of bankruptcies throughout the United States is unrestricted and paramount.").

As Justice Clifford wrote in *Sherman v. Bingham*, 21 F. Cas. 1270 (1st Cir. 1872), a case involving consideration of the jurisdiction of a federal court to direct the recovery of money located outside its territorial jurisdiction to be included as part of the debtor's bankruptcy estate: "Nothing of greater importance is required to be done under and in virtue of the bankruptcy than the collection of the assets belonging to the estate of the bankrupt." *Id.* at 1271. As the court further explained in upholding federal jurisdiction: "Refusal to pay a just debt, is a wrong for which the . . . [bankruptcy trustee] ought to have a remedy not dependent upon the option of a state court, but it is clear that the plaintiff has none such in this case, unless the jurisdiction of the district court in this district is sustained." *Id.* at 1274.

In reaching this conclusion, Justice Clifford observed that the concept of uniformity encompasses a comprehensive authority to deal with the bankruptcy estate and the obligation of any person to transfer property to it: "Comprehensive and explicit as . . . [the Bankruptcy Clause] of the constitution is, it is not possible to doubt that it empowers congress, not only to establish uniform laws on the subject of bankruptcies throughout the United States, but also to commit the execution of the system to such courts of the United States as congress shall see fit, and to prescribe such modes of procedure and means of

administering the system as congress in their discretion shall deem best suited to carry it into successful operation." *Id.* at 1272; *see also id.* at 1273 ("Beyond doubt congress, in enacting the bankrupt law, intended to make it uniform throughout the United States, and in order to secure such uniformity congress obviously intended to create or to designate tribunals and officers to execute all its provisions.").

In *Lathrop v. Drake*, 91 U.S. 516 (1875), the Court expressly adopted Justice Clifford's reasoning in upholding Congress's vesting of the federal courts with a comprehensive federal jurisdiction over the rights and powers conferred under the Bankruptcy Act of 1867:

> [A] uniform system of bankruptcy, national in its character, ought to be capable of execution in the national tribunals, without dependence upon those of the States in which it is possible that embarrassments might arise. The question has been quite fully and satisfactorily discussed by a member of this court in the first circuit, in the case of *Sherman v. Bingham*, . . . and we concur in the opinion there expressed.

Id. at 518; *see also Babbitt v. Dutcher*, 216 U.S. 102, 110-11 (1910) (following *Lathrop* and *Sherman*).

In *In re Wood*, 210 U.S. 246 (1908), the Court considered the procedures employed by the bankruptcy court in reviewing the debtor's transfer of property to his counsel prior to commencing his bankruptcy case. Under applicable law, the bankruptcy court could undo the transfer under certain conditions, thus bringing the transferred property into the estate. 210 U.S. at 253. In concluding that the bankruptcy court could conduct the adjudication, the Court observed: "Congress has the right to establish a uniform system of bankruptcy throughout the United States; and, having given jurisdiction to a particular district court to administer and distribute the property, it may, in some proper way, in such a case as this, call upon all interested to appear and assert their rights." *Id.* at 254.

In a series of decisions, the Court also has recognized that the essential, core functions of the nation's bankruptcy law are binding upon the States irrespective of their consent, and, further, that "we have previously endorsed individualized determinations of States' interests within the federal courts' *in rem* jurisdiction." *Hood*, 541 U.S. at 450. In doing so, the Court has indicated that a central reason for this conclusion is that, as the uniformity requirement itself indicates, bankruptcy law demands the uniform administration against all creditors of a collective proceeding that affects the rights of many parties, including state agencies. If all creditors were not bound to the proceeding, it would not be possible to administer it in a systematic fashion consistent with the fundamental goals of bankruptcy law and the Bankruptcy Clause itself. *See Railway Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457, 472 (1982) ("The Framers sought to provide Congress with the power to enact uniform laws on the subject [of bankruptcies] enforceable among the States.").

For example, in *Irving Trust* the Court considered Congress's authority to divide a bankruptcy estate among creditors and deny the State of New York a share unless the State complied with applicable bankruptcy procedures. Concluding that Congress had such authority, the Court quoted from its prior decision in *Wood*, reiterating that "Congress has the right to establish a uniform system of bankruptcy throughout the United States; and having given jurisdiction to a particular district court to administer and distribute the property, it may, in some proper way, in such a case as this, call upon all interested to appear and assert their rights." *Irving Trust*, 288 U.S. at 332 (quoting *Wood*, 210 U.S. at 254). Again, the Court reasoned that otherwise it would not be possible to administer the bankruptcy estate consistent with the fundamental goals of bankruptcy law. *Irving Trust*, 288 U.S. at 333.

Similarly, in *Van Huffel*, the Court considered whether a bankruptcy court had the authority to sell property free and clear of the State's lien for unpaid taxes. In concluding that it does, the Court explained that the collection and distribution of the debtor's property is an essential function of bankruptcy law, and that "[r]ealization upon the lien created by the state law must yield to the requirements of bankruptcy administration." *Van Huffel*, 284 U.S. at 228; *see also Gardner*, 329 U.S. at 576 ("[B]oth in receivership cases, . . . and in bankruptcy cases, . . . the authority of the court to deal with the lien of a State has long been recognized. In reorganization cases the task of resolving disputes as to liens is a common one for the court.") (citations omitted). As in *Irving Trust*, the Court in *Gardner* explained that the ability of the bankruptcy court to deal with a State's tax lien was essential to maintaining the integrity of the process:

> If the reorganization court lacked the power to deal with tax liens of a State, the assertion by a State of a lien would pull out chunks of an estate from the reorganization court and transfer a part of the struggle over the corpus into tax bureaus and other state tribunals. That would . . . seriously impair the power of the court to administer the estate . . . It is the exclusive jurisdiction of the reorganization court which gives it power to preserve the [debtor] as a unit and as a going concern to prevent it from being divided up and dismembered piece-meal. Only in that way can continuous operation of the [debtor] be assured and a plan of reorganization be effected which not only safeguards the interests of the various claimants but is also compatible with the public interest.

Gardner, 329 U.S. at 473-74 (citations omitted).

In *Hood*, the Court extended the analysis to the question of the debtor's discharge, stating that "[u]nder our longstanding precedent, States, whether or not they choose to participate in the proceeding, are bound by a bankruptcy court's discharge order

no less than other creditors." 541 U.S. at 448; *see also Stellwagon v. Clum*, 245 U.S. 605, 613 (1918). Obviously, if a State were not so bound, the effectiveness of the bankruptcy system of discharge would be seriously impaired, if not destroyed altogether.

As this Court's precedents reveal, the uniformity requirement encompasses not one but numerous manifestations that replace or impair the prerogatives of the States, or that recognize in Congress authority that is affirmatively denied the States elsewhere in the Constitution. *See Pinkus*, 278 U.S. at 265 ("The national purpose to establish uniformity necessarily excludes state regulation."); *Stellwagon*, 245 U.S. at 613; *Moyses*, 186 U.S. at 188 ("The subject of 'bankruptcies' includes the power to discharge the debtor from his contracts and legal liabilities, as well as to distribute his property. The grant to Congress involves the power to impair the obligation of contracts, and this the states were forbidden to do."); *Ogden v. Saunders*, 25 U.S. 213 (1827) (state law could not discharge debt owed to citizen of another State); *Sturges*, 17 U.S. at 208 ("the act of the state of New York . . . so far as it attempts to discharge this defendant from the debt . . . is contrary to the constitution of the United States"). In this case, the relevant manifestation is that Congress is entitled to establish a uniform proceeding governing the determination of title to property that Wallace transferred to Petitioners, and to require that the property, or its value, be transferred to the estate if Wallace's transfer is avoided under section 547. Just as the States are bound by other aspects of a bankruptcy court's authority, they are bound in this case regardless of their consent because otherwise the reach of the preference rules would not be uniform and States would escape a critical component of the bankruptcy law.

3. Under the plan of the convention, the States surrendered their sovereignty to disregard the administration of bankruptcy cases, including the authority to determine questions of title and recover property.

As the Court has indicated, "immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . *except as altered by the plan of the Convention* or certain constitutional amendments." *Alden*, 527 U.S. at 713 (emphasis added). As explained above, the unique nature of a bankruptcy court's jurisdiction and functions, combined with the uniformity requirement of the Bankruptcy Clause, compel the conclusion that Petitioners are bound in this case to application of the Bankruptcy Code's preference rules. This is bolstered by evidence from the historical record, including THE FEDERALIST PAPERS.

As the Court stated in *Cohens*: "The opinion of the Federalist has always been considered as of great authority. It is a complete commentary on our constitution . . . . Its intrinsic merit entitled it to this high rank; and the part two of its authors performed in framing the constitution, put it very much in their power to explain the views with which it was framed." 19 U.S. at 418; *see also Printz v. United States*, 521 U.S. 898, 918-21 (1997); *Seminole Tribe*, 517 U.S. at 54, 69, 70 n.13.

In THE FEDERALIST NO. 81, Hamilton discussed sovereign immunity as follows:

> It is inherent in the nature of sovereignty, not to be amendable to the suit of an individual *without its consent*. This . . . exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states, and the

> danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of state sovereignty, were discussed in considering the article of taxation, and need not be repeated here.

THE FEDERALIST NO. 81, at 422 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001). The article on taxation to which Hamilton refers is THE FEDERALIST NO. 32:

> But as the plan of the convention aims only at a partial Union or consolidation, the State Governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, exclusively delegated to the United States. This *exclusive* delegation, or rather this alienation of state sovereignty, would only exist in three cases: where the constitution in express terms granted an exclusive authority to the union; where it granted, in one instance, an authority to the union, and in another, prohibited the states from exercising the like authority; and where it granted an authority to the union, to which a similar authority in the states would be absolutely and totally *contradictory* and *repugnant*.

THE FEDERALIST NO. 32, at 155 (Alexander Hamilton). Hamilton offered naturalization as an example of this third form of alienation of sovereignty: "The third will be found in that clause, which declares that Congress shall have power 'to establish a UNIFORM RULE of naturalization through the United States.". THE FEDERALIST NO. 32, at 155 (Alexander Hamilton). Hamilton explained that the power to make "uniform" laws "must necessarily be exclusive; because if each State had power to prescribe a DISTINCT RULE, there could be no UNIFORM RULE." THE FEDERALIST NO. 32, at 155 (Alexander Hamilton).

Like the power to enact "uniform" rules of naturalization, the Constitution vests in Congress the power to enact uniform bankruptcy laws. In this case, the ability of a state agency to disregard the jurisdiction of a bankruptcy court over preferential transfers constitutes a distinct state rule at odds with the uniform rule of bankruptcy law. A transfer of property avoided under section 547 is preserved for the benefit of the estate under section 551; must be returned under section 542; and may be recovered under sections 550. As explained above, application of these provisions does not involve a suit by a private citizen against an un-consenting State for the violation of some state law entitlement. On the contrary, the application of these provisions fulfills the command of federal bankruptcy law over the determination and disposition of property of the bankruptcy estate. Under the plan of the convention, state agencies must yield to the federal power to decide what property belongs to the estate and to the administration of the estate.

As the Court has observed, "the framers of the Constitution were familiar with . . . the bankrupt laws of England." *Hanover Nat'l Bank of the City of New York v. Moyses*, 186 U.S. 181, 187 (1902). In England, the recovery of voidable preferences has a long history that predates the Constitutional Convention. Lord Coke first explained the basic concept in 1584 and its central premise of equality of distribution. *See The Case of Bankrupts*, 76 Eng. Rep. 441 (K.B. 1584) ("it would be unequal and unconscionable, and a great defect in the law, if, after that he hath utterly discredited himself by becoming a bankrupt, the law should credit him to make distribution of his goods to whom he pleases"). By 1758, the recovery of preferential transfers in a manner similar to that prescribed by the Bankruptcy Code had become established law. *See Worsely v. DeMattos*, 1 Burr. 467, 482, 96 Eng. Rep. 1160 (K.B. 1758) (Mansfield, J.) (a debtor's voluntary payment to a creditor, not in the regular course of business, was "void with respect to the other creditors"). During the colonial era, different States likewise experimented with preference laws. *See* Peter J. Coleman, DEBTORS AND CREDITORS IN AMERICA:

INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUPTCY, 1607-1900 69, 212 (1974) (discussing Vermont and Delaware laws); F. Regis Noel, A HISTORY OF THE BANKRUPTCY LAW, 43-44 (2002) (discussing Maryland law); Thomas E. Plank, *Bankruptcy and Federalism*, 71 Fordham L. Rev. 1063, 1086-87 (2002) (discussing Maryland law). The concept of a preferential recovery is thus not a recent invention, but rather has existed as part of the larger fabric of bankruptcy law for many centuries.

Moreover, that Congress understood from the very beginning that exercise of the Bankruptcy Power could abrogate the rights of the States is also evidenced by the first Bankruptcy Act of 1800, which vested the district courts with broad subject matter jurisdiction over bankruptcy cases. *See* 2 Stat. 164, section 11. Congress specifically provided in section 62 of the first Act that "[n]othing contained in this law shall, in any manner, affect the right of preference to prior satisfaction of debts due to the United States as secured or provided by any law heretofore passed, nor shall be construed to lessen or impair any right to, or security for, money due to the United States or to any of them." 2 Stat. 19 (repealed 1803, 2 Stat. 248). If Congress did not understand that the rights of the States could properly be adjusted, there would have been no need for this provision. Indeed, commenting on section 62 in 1805, this Court explained that the section was designed "to retain the right of the United States in their existing situation, whatever that situation may be." *United States v. Fisher*, 6 U.S. 358, 394 (1805).

Finally, the concept that a bankruptcy court may enforce its jurisdiction over property that should be included as part of the estate by requiring the turnover of property out of the hands of governmental officials is bolstered by the fact that the Act of 1800 also authorized habeas relief: debtors under the Act were entitled to an order directing their release from prison if incarcerated on account of a discharged obligation. Act of 1800 at § 38, 2 Stat. 32 ("[I]f any bankrupt, who shall have obtained [a certificate of discharge], shall be taken in execution or detained in prison, on account of any debts owing before he became a

bankrupt . . . it shall be lawful for any of the judges of the court wherein judgment was so obtained, or for any court, judge, or justice, within the district in which such bankrupt shall be detained, having powers to award or allow the writ of *habeas corpus*, on such bankrupt producing his certificate so as aforesaid allowed, to order any sheriff or gaoler who shall have such bankrupt in custody, to discharge such bankrupt without fee or charge."). Just as a bankruptcy court may require the turnover of the debtor himself out of state custody in the exercise of its essential bankruptcy jurisdiction, it may also require from a state agency the turnover of his property to be administered as part of the federally created bankruptcy estate.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the Court of Appeals.

Respectfully submitted,

G. Eric Brunstad, Jr.
BINGHAM MCCUTCHEN LLP
One State Street
Hartford, CT 06103
(860) 240-2717

Kim Martin Lewis
Counsel of Record
John L. Fleischaker
Mark A. Vander Laan
Jeremy S. Rogers
DINSMORE & SHOHL LLP
255 East Fifth St., Suite 1900
Cincinnati, OH 45202
(513) 977-8200

Counsel for Respondent

Dated: August 22, 2005

(13)

No. 04-885

Supreme Court, U.S.
FILED
SEP 26 2005
OFFICE OF THE CLERK

In The
Supreme Court of the United States

CENTRAL VIRGINIA COMMUNITY COLLEGE,
VIRGINIA MILITARY INSTITUTE,
NEW RIVER COMMUNITY COLLEGE, and
BLUE RIDGE COMMUNITY COLLEGE,

Petitioners,

v.

BERNARD KATZ, Liquidating Supervisor
for *Wallace's Bookstores, Inc.*,

Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Sixth Circuit**

REPLY BRIEF OF THE PETITIONERS

JUDITH WILLIAMS JAGDMANN
Attorney General of Virginia

WILLIAM E. THRO
State Solicitor General
Counsel of Record

MATTHEW M. COBB
CARLA R. COLLINS
ERIC A. GREGORY
JOEL C. HOPPE
COURTNEY M. MALVEAUX
VALERIE L. MYERS
A. CAMERON O'BRION
RONALD N. REGNERY
D. MATHIAS ROUSSY, JR.
WILLIAM R. SIEVERS
Associate State
Solicitors General

BERNARD L. MCNAMEE II
Chief Deputy
Attorney General

MAUREEN RILEY MATSEN
Deputy Attorney General

BRIAN J. GOODMAN
CYNTHIA H. NORWOOD
Assistant Attorneys General

OFFICE OF THE
ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
Telephone: (804) 786-2436
Facsimile: (804) 786-1991

Counsel for the Petitioners

September 26, 2005

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF OF THE PETITIONERS	1
I. CONGRESS MAY NOT USE THE BANKRUPTCY CLAUSE TO ABROGATE SOVEREIGN IMMUNITY	3
II. THE UNITED STATES HAS NOT DELEGATED ITS SOVEREIGN EXEMPTION TO KATZ	5
III. SOVEREIGN IMMUNITY HAS NOT BEEN WAIVED	7
A. When a State Agency Files a Proof Of Claim in Bankruptcy, It Does Not Waive Sovereign Immunity for All Claims	8
B. When One State Agency Files a Proof of Claim in Bankruptcy, the Effects of That Filing May Not Be Extrapolated to Other State Agencies	13
IV. THE SUIT TO RECOVER PREFERENCES DOES NOT FALL WITHIN AN *IN REM* JURISDICTION EXCEPTION TO SOVEREIGN IMMUNITY	14
A. A Suit To Recover a Preferential Transfer Does Not Fall Within the Bankruptcy Court's *In Rem* Jurisdiction	15
B. Sovereign Immunity Bars *In Rem* Proceedings	17
CONCLUSION	20

TABLE OF AUTHORITIES

Page

CASES

Alden v. Maine,
527 U.S. 706 (1999) 4, 5

Atascadero State Hosp. v. Scanlon,
473 U.S. 234 (1985) 3

Bezner v. East Jersey State Prison (In re Exact Temp, Inc.),
231 B.R. 566 (Bkr. D.N.J. 1999) 14

Blatchford v. Native Vill. of Noatak,
501 U.S. 775 (1991) 6

California v. Deep Sea Research, Inc.,
523 U.S. 491 (1998) 18, 19

California State Bd. of Equalization v. Sierra Summit, Inc.,
490 U.S. 844 (1989) 5, 18

College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.,
527 U.S. 666 (1999) 8, 11, 12

Cutter v. Wilkinson,
125 S. Ct. 2113 (2005) 2

Department of the Army v. Blue Fox, Inc.,
525 U.S. 255 (1999) 13

Federal Mar. Comm'n v. South Carolina State Ports Auth.,
535 U.S. 743 (2002) 4

Fernandez v. PNL Asset Mgmt. Co. LLC (In re Fernandez),
123 F.3d 241 (5th Cir.),
amended by 130 F.3d 1138 (5th Cir. 1997) 1

TABLE OF AUTHORITIES – Continued

Page

Florida Dept. of State v. Treasure Salvors, Inc.,
458 U.S. 670 (1982) 18, 19

Gardner v. New Jersey,
329 U.S. 565 (1947) 9, 10, 11, 12

Georgia Higher Educ. Assistance Corp. v. Crow (In re Crow),
394 F.3d 918 (11th Cir. 2004) 1

Granfinanciera, S.A. v. Nordberg,
492 U.S. 33 (1989) 16

Hans v. Louisiana,
134 U.S. 1 (1890) 4

Heath v. Alabama,
474 U.S. 82 (1985) 7, 15

Hinchey v. Ogden,
307 S.E.2d 891 (Va. 1983) 13

Hoffman v. Connecticut Dep't of Income Maint.,
492 U.S. 96 (1989) 17

Idaho v. Coeur d'Alene Tribe,
521 U.S. 261 (1997) 18

Jones v. Yorke (In re Friendship Med. Center, Ltd.),
710 F.2d 1297 (7th Cir. 1983) 10

Katz v. New River Community Coll. (In re Wallace's Bookstores, Inc.),
___ B.R. ___, 2005 WL 2224849 (Bkr. E.D. Ky. 2005) 2

Lapides v. Board of Regents of the University Sys. of Georgia,
535 U.S. 613 (2002) 9

Matsushita Elec. Indus. Co. v. Epstein,
516 U.S. 367 (1996) 5, 15

TABLE OF AUTHORITIES – Continued

Page

Missouri v. Fiske,
290 U.S. 18 (1933) 17

Mitchell v. Franchise Tax Bd. (In re Mitchell),
209 F.3d 1111 (9th Cir. 2000) 1

Nelson v. LaCrosse County Dist. Attorney (In re Nelson),
301 F.3d 820 (7th Cir. 2002) 1

Northern Pipeline Const. Co. v. Marathon Pipe Line Co.,
458 U.S. 50 (1982) 16

Ohio v. Madeline Marie Nursing Homes Nos. 1 & 2,
694 F.2d 449 (6th Cir. 1982) 10

Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe,
498 U.S. 505 (1991) 9, 10

Ossen v. Department of Social Servs. (In re Charter Oak Associates),
361 F.3d 760 (2nd Cir.)
cert. denied,
125 S. Ct. 408 (2004) 14

Pennsylvania v. Union Gas Co.,
491 U.S. 1 (1989) 3

Raygor v. Regents of the University of Minnesota,
534 U.S. 533 (2002) 6, 7

Sacred Heart Hosp. v. Department of Pub. Welfare (In re Sacred Heart Hosp.),
133 F.3d 237 (3rd Cir. 1998) 1

Sacred Heart Hosp. v. Department of Pub. Welfare (In re Sacred Heart Hosp. of Norristown),
204 B.R. 132 (E.D. Pa. 1997) 14

TABLE OF AUTHORITIES – Continued

Page

Schlossberg v. Barney (In re Barney),
380 F.3d 174 (4th Cir. 2004) 5

Schlossberg v. Maryland
(In re Creative Goldsmiths),
119 F.3d 1140 (4th Cir. 1997) 1

Schoenthal v. Irving Trust Co.,
287 U.S. 92 (1932) 16

Seminole Tribe v. Florida,
517 U.S. 44 (1996) 3, 11

Shaffer v. Heitner,
433 U.S. 186 (1977) 17

Smith v. Dowden,
47 F.3d 940 (8th Cir. 1995) 13

Stewart v. North Carolina,
393 F.3d 484 (4th Cir. 2005) 9

Tennessee Student Assistance Corp. v. Hood,
319 F.3d 755 (2003) (*Hood I*) 3

Tennessee Student Assistance Corp. v. Hood,
541 U.S. 440 (2004) (*Hood II*) 1, 12, 16, 17

Unicare Homes, Inc. v. Four Seasons Care Centers, Inc.
(In re Four Seasons Care Centers, Inc.),
119 B.R. 681 (Bkr. D. Minn. 1990) 14

United States v. Nordic Vill.,
503 U.S. 30 (1992) 15, 17, 18, 19

United States v. Shaw,
309 U.S. 495 (1940) 9, 10

United States v. United States Fid. &
Guar. Co.,
309 U.S. 506 (1940) 9

TABLE OF AUTHORITIES – Continued

Page

United States v. Whiting Pools, Inc.,
462 U.S. 198 (1983) 18

United States v. Williams,
504 U.S. 36 (1992) 7

United States ex rel. Long v. SCS Business & Technical Inst., Inc.,
173 F.3d 870 (D.C. Cir. 1999) 6

Vermont Agency of Natural Resources v. United States ex rel. Stevens,
529 U.S. 765 (2000) 7

Will v. Michigan Dep't of State Police,
491 U.S. 58 (1989) 6

William Ross, Inc. v. Biehn Constr., Inc. (In re Ross),
199 B.R. 551 (Bkr. W.D. Pa. 1996) 14

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I 3, 4

U.S. Const. art. I, § 8, cl. 4 ..... 1, 2, 3, 20

STATUTES

11 U.S.C. § 106(a) 1

11 U.S.C. § 106(b) 14

11 U.S.C. § 106(c) 11

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Karen Cordry,
Seminole Seven Years On,
in *Annual Survey of Bankruptcy Law 2002-03*, 383
(William L. Norton ed., 2003) 9

Adam Feibelman,
Federal Bankruptcy Law and State Sovereign Immunity,
81 Tex. L. Rev. 1381 (2003) 11

REPLY BRIEF OF THE PETITIONERS

This Court granted certiorari to determine whether Congress may use the Article I Bankruptcy Clause, U.S. Const. art. I, § 8, cl. 4, to abrogate the States' sovereign immunity. Having avoided this exact issue in *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004) (*Hood II*), this Court presumably wished to decide an issue that divides the Circuits, is constantly recurring, and affects all fifty States. Indeed, the *sole* rationale for the lower court's decision is that Congress may use the Bankruptcy Clause to abrogate sovereign immunity.

Yet, Katz largely ignores the question presented. Instead, he urges this Court to decide this case on alternative grounds.[1] Specifically, he argues that: (1) the United States has delegated its "sovereign exemption" to him and, thus, his suit is actually a suit between the United

---

[1] Katz asserts that this Court should address his novel arguments as a means of avoiding the question of whether 11 U.S.C. § 106(a) is unconstitutional. However, all of Katz' arguments are equally based on constitutional considerations, not the statutory language of the Bankruptcy Code, and acceptance of any of those novel points would have serious ramifications for the States. Consequently, this Court simply would be substituting one constitutional question for another. Moreover, while the lower court found 11 U.S.C. § 106(a) to be valid, six different Circuits have ruled that it is unconstitutional. *See Georgia Higher Educ. Assistance Corp. v. Crow (In re Crow)*, 394 F.3d 918, 921-22 (11th Cir. 2004); *Nelson v. LaCrosse County Dist. Attorney (In re Nelson)*, 301 F.3d 820, 832 (7th Cir. 2002); *Mitchell v. Franchise Tax Bd. (In re Mitchell)*, 209 F.3d 1111, 1121 (9th Cir. 2000); *Sacred Heart Hosp. v. Department of Pub. Welfare (In re Sacred Heart Hosp.)*, 133 F.3d 237, 243 (3rd Cir. 1998); *Fernandez v. PNL Asset Mgmt. Co. LLC (In re Fernandez)*, 123 F.3d 241, 243 (5th Cir.), *amended by* 130 F.3d 1138, 1139 (5th Cir. 1997); *Schlossberg v. Maryland (In re Creative Goldsmiths)*, 119 F.3d 1140, 1145-46 (4th Cir. 1997). Thus, in order to have national uniformity, it is imperative that this Court resolve the constitutionality of 11 U.S.C. § 106(a).

States and Virginia; (2) because Virginia Military Institute filed a proof of claim, sovereign immunity has been waived for *all* claims against Virginia Military Institute as well as all claims against Central Virginia Community College, New River Community College, and Blue Ridge Community College; and (3) the suit to recover preferences falls within an *in rem* jurisdiction exception to sovereign immunity.[2] None of these arguments were addressed by the court of appeals. Because this Court sits as a court of review, not as a court of "first view," this Court should decline to address them. *See Cutter v. Wilkinson*, 125 S. Ct. 2113, 2120 n.7 (2005) (declining to address federalism arguments that were presented, but not passed on in the court of appeals). Rather, this Court should focus exclusively on the question presented. If this Court concludes that Congress may not use the Bankruptcy Clause to abrogate sovereign immunity, then this Court may

---

[2] Throughout this litigation, Katz has pursued breach of contract claims against the Petitioners. *See* J.A. at 14, ¶ 15 (Central Virginia Community College); J.A. at 5, ¶ 15 (Virginia Military Institute); J.A. at 31, ¶ 19 (New River Community College); J.A. at 22, ¶ 17 (Blue Ridge Community College). However, after reading the *Brief of the Petitioners*, Katz attempted to abandon his breach of contract claims. *See Resp. Br.* at 7 n.13 ("Katz has moved voluntarily to dismiss the second group of claims, leaving only the preference actions."). On September 13, 2005, the bankruptcy court – correctly noting that it had no jurisdiction to entertain such a request – denied Katz' motion to dismiss the breach of contract claims. *Katz v. New River Community Coll. (In re Wallace's Bookstores, Inc.)* ___ B.R. ___, 2005 WL 2224849 (Bkr. E.D. Ky. 2005). Thus, the breach of contract claims remain in the case.

In any event, while there are fundamental differences between the breach of contract claims and the preferential transfer claims, those differences are irrelevant for purposes of the question presented. If Congress may not use the Bankruptcy Clause to abrogate sovereign immunity, then both the breach of contract claims and the preferential transfer claims are equally barred by sovereign immunity.

choose to remand the case to the court of appeals for consideration of any remaining issues.[3]

I. CONGRESS MAY NOT USE THE BANKRUPTCY CLAUSE TO ABROGATE SOVEREIGN IMMUNITY.

To the extent that Katz addresses the question presented, he essentially argues that a Sovereign's power to legislate substantively is inseparable from a Sovereign's immunity. Thus, in his view, when the States ceded the power to enact bankruptcy laws to the new National Government, the States necessarily and inherently ceded their immunity as well. This view, which has never commanded a majority of this Court, was rejected explicitly in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238 n.2 (1985) and *Seminole Tribe v. Florida*, 517 U.S. 44, 72 n.16 (1996).[4] "The Constitution, by delegating to Congress the power to establish the supreme law of the land when

---

[3] In the event that this Court remands for further proceedings, there will be serious questions as to whether Katz waived the *in rem* and liquidating supervisor as sovereign arguments by failing to raise them in the district court or the court of appeals. *See Tennessee Student Assistance Corp. v. Hood*, 319 F.3d 755, 760 (2003) (*Hood I*) (Sixth Circuit "will not consider arguments raised for the first time on appeal. . . ."). A similar issue will exist with respect to whether the effect of one agency filing a proof of claim may be extrapolated to other state agencies and institutions.

[4] Although *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 14-15 (1989), held that Congress might use some of its Article I powers to abrogate sovereign immunity, only four Justices endorsed the view that by ceding the sovereign power to legislate, the States had also ceded their sovereign immunity from suit. *See id. at* 19-20 (Brennan, J., joined by Marshall, Blackmun, & Stevens, J.J., announcing the judgment of the Court). Justice White, who provided the fifth vote for the judgment, refused to join in this rationale. *See id.* at 56-57 (White, J., concurring).

acting within its enumerated powers, does not foreclose a State from asserting immunity to claims arising under federal law merely because that law derives not from the State itself but from the national power." *Alden v. Maine*, 527 U.S. 706, 732 (1999). Nevertheless, two points should be reiterated.

First, in assessing whether sovereign immunity applies to a particular proceeding, the relevant inquiry is not whether the proceeding, as such existed in 1788, but whether such proceedings could be brought against the States at that time. *See Federal Mar. Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 755 (2002) (There is a presumption "that the Constitution was not intended to 'rais[e] up' any proceedings *against the States* that were 'anomalous and unheard of when the Constitution was adopted.'") (quoting *Hans v. Louisiana*, 134 U.S. 1, 18 (1890)) (emphasis added). Suits between private parties for payment of a note, such as was the basis for the suit in *Hans*, were common in 1788, but breach of contract suits against the States were unknown. Similarly, suits to recover preferential transfers may well have existed in 1788, but such proceedings against the States were unknown. Accordingly, sovereign immunity applies to Katz' claims.

Second, in assessing whether the States ceded their immunity for bankruptcy proceedings in the Plan of Convention, the presumption is against a surrender of immunity. *See Alden*, 527 U.S. at 730-31. In the absence of "compelling evidence" that the States were required to surrender this power to Congress pursuant to the constitutional design, "Congress may not use its Article I powers to diminish the States' sovereign immunity." *Id.* at 730-31. Because there is no "compelling evidence" that the States intended to cede their immunity for suits in bankruptcy,

the States retained their immunity. *See id.* at 741 ("We believe, however, that the Founders' silence is best explained by the simple fact that no one, not even the Constitution's most ardent opponents, suggested the document might strip the States of the immunity."). Accordingly, States have retained their sovereign immunity in the area of bankruptcy.

II. THE UNITED STATES HAS NOT DELEGATED ITS SOVEREIGN EXEMPTION TO KATZ.

Katz, like all bankruptcy trustees and liquidating supervisors, "is 'the representative of the estate [of the debtor]', *not 'an arm of the Government.'" California State Bd. of Equalization v. Sierra Summit, Inc.*, 490 U.S. 844, 849 (1989) (brackets original, emphasis added). *See also Schlossberg v. Barney* (*In re Barney*), 380 F.3d 174, 181 (4th Cir. 2004) ("[W]e do not believe that Congress intended the bankruptcy trustee to wield the extraordinary collection powers of the federal government."). Nevertheless, in an effort to avoid the question presented, Katz asserts that this case is really a suit between the United States and the Commonwealth of Virginia and, thus, is not subject to Virginia's sovereign immunity. Specifically, Katz contends that the United States has delegated its "sovereign exemption" from the States' sovereign immunity to liquidating trustees such as Katz. This argument was neither pressed nor passed on below and should not be addressed by this Court. *See Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 379 n.5 (1996) ("[W]e generally do not address arguments that were not the basis for the decision below."). However, should this Court choose to address it, it should be rejected.

Katz' argument depends on the validity of two propositions. First, it must be constitutionally possible for the United States to delegate its sovereign exemption to a private party. Second, assuming that it is constitutionally possible for the United States to delegate its sovereign exemption, the United States must actually have done so. Neither proposition is true.

First, it is doubtful that the United States may delegate the sovereign exemption to another party. *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 785 (1991). "The consent, 'inherent in the convention,' to suit by the United States – at the instance and under the control of responsible federal officers – is not consent to suit by anyone whom the United States might select; and even consent to suit by the United States for a particular person's benefit is not consent to suit by that person himself." *Id. See also United States ex rel. Long v. SCS Business & Technical Inst., Inc.*, 173 F.3d 870, 883 (D.C. Cir. 1999) ("To assume that the United States possesses plenary power to do what it will with its Eleventh Amendment exemption is to acknowledge that Congress can make an end-run around the limits that that Amendment imposes on its legislative choices.").

Second, even if the United States constitutionally may delegate its sovereign exemption, it has not done so. "[I]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989) (internal quotation marks omitted). "[T]he clear statement principle reflects 'an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.'" *Raygor v.*

Regents of the University of Minnesota, 534 U.S. 533, 543 (2002). Thus, if Katz is going to claim that the United States' sovereign exemption has been delegated to him, he must identify a statute that clearly and unambiguously delegates the sovereign exemption. *See Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 787 (2000) (Because Congress did not clearly and unambiguously state that a State was a "person" under the False Claims Act, a *qui tam* relator could not bring suit on behalf of the United States against a State.). There is no such statute.

III. SOVEREIGN IMMUNITY HAS NOT BEEN WAIVED.

In a further effort to avoid the question presented, Katz asserts that because Virginia Military Institute filed a proof of claim, sovereign immunity is waived for all claims against Virginia Military Institute *and all claims against any other agency or institution of the Commonwealth of Virginia*.[5] While Katz did argue in the lower courts that the filing of a proof of claim by Virginia Military Institute constituted a waiver of sovereign immunity *for all claims against Virginia Military Institute*, Katz never argued that such a waiver extended beyond Virginia Military Institute. Because the court of appeals never passed on the argument, this Court should decline to address it. *See Heath v. Alabama*, 474 U.S. 82,

[5] Katz made this waiver argument in his *Brief in Opposition to the Petition*. *See Br. in Op.* at 2-5. In deciding to grant certiorari, this Court "necessarily considered and rejected that contention as a basis for denying review." *United States v. Williams*, 504 U.S. 36, 40 (1992).

87 (1985) ("Even if we were not jurisdictionally barred from considering claims not pressed or passed upon in the [lower courts], as has sometimes been stated, ... the longstanding rule that this Court will not consider such claims creates, at the least, a weighty presumption against review."). However, should this Court decide to consider this argument, it should be rejected.[6]

Katz' waiver argument depends upon two propositions. First, when a state agency files a proof of claim for any amount, it waives its sovereign immunity for *all* claims against it. Second, when one state agency files a proof of claim, the legal effect of that filing is extrapolated to every other agency and institution of the State. Neither proposition is correct.

A. When a State Agency Files A Proof of Claim in Bankruptcy, It Does Not Waive Sovereign Immunity for All Claims.

When a State initiates litigation, it does not waive its sovereign immunity for *all* claims against it. Rather, it merely invokes the jurisdiction of the federal courts and exposes itself to defenses that may exist to its suit. These include compulsory counter-claims that do not exceed in amount or differ in kind from the relief sought by the State.[7]

---

[6] In the event that this Court decides to address the waiver argument, it should do so only after addressing the abrogation argument. When confronted with both an abrogation argument and a waiver argument, this Court has decided the abrogation issue first and then proceeded to address the waiver argument. *See College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999).

[7] Similarly, when a State removes a suit from state court to federal court, it does not waive its sovereign immunity for all claims against it.

(Continued on following page)

See Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe, 498 U.S. 505, 509 (1991); *United States v. United States Fid. & Guar. Co.*, 309 U.S. 506, 511-12 (1940); *United States v. Shaw*, 309 U.S. 495, 501-02 (1940). On occasion, this Court has described the initiation of litigation in federal court as constituting a "waiver" of sovereign immunity. *See Gardner v. New Jersey*, 329 U.S. 565, 573-74 (1947) (When a State files a bankruptcy proof of claim, it "waives any immunity . . . respecting the adjudication of *the claim*.") (emphasis added). Yet, the use of the term "waiver" is something of a mischaracterization. Sovereign immunity is immunity from suit by another party. As such, it does not come into play when the State initiates litigation. Rather, the initiation of litigation is merely the voluntary action by a State to invoke its right of access to a federal court to protect the State's legal interests. *See* Karen Cordry, *Seminole Seven Years On*, in *Annual Survey of Bankruptcy Law 2002-03*, 383, 455 (William L. Norton ed., 2003).

This Court's decisions implicitly hold that the initiation of litigation simply exposes the State to the equivalent of a compulsory counter-claim that does not exceed in amount or differ in kind from the relief sought by the State. For example, where the sovereign initiates a suit for injunctive relief, a counter-claim or cross-claim for damages is barred. *Potawatomi Tribe*, 498 U.S. at 509; *United States Fid. & Guar. Co.*, 309 U.S. at 513. In other

---

See Stewart v. North Carolina, 393 F.3d 484, 488-90 (4th Cir. 2005). Rather, the act of removal merely diminishes sovereign immunity for "state-law claims, in respect to which the State has explicitly waived immunity from state-court proceedings." *Lapides v. Board of Regents of the University Sys. of Georgia*, 535 U.S. 613, 617 (2002).

words, the filing of a claim did not create a broad waiver of sovereign immunity. *See Potawatomi Tribe*, 498 U.S. at 509. Rather, the filing of a claim merely allows the adjudication of *that* claim. *Gardner*, 329 U.S. at 574. Consequently, where a State brings an action for damages, any counter-claim seeking an amount of damages in excess of the amount originally sought by the sovereign, even with respect to a mandatory counter-claim, is barred by sovereign immunity. *Shaw*, 309 U.S. at 501. Similarly, if a state agency files a proof of claim in bankruptcy, the resulting partial waiver of sovereign immunity logically is limited to the amount of its claim.[8]

A close reading of *Gardner* confirms this point. In *Gardner*, the State filed a proof of claim for taxes allegedly owed to the State. *Gardner*, 329 U.S. at 570. In response, the bankruptcy trustee raised various defenses to the claim for taxes. *Id.* at 570-71. In other words, the bankruptcy trustee was not seeking to obtain a payment of money from the State, but was merely defending against the State's claim. *See id.* at 574 ("The State is seeking something from the debtor. No judgment is sought against the State."). Nevertheless, the State contended that sovereign immunity barred the trustee's defenses. *See id.* at 571 ("The Attorney General of New Jersey thereupon entered a special appearance in the proceedings, claiming, *inter alia*, that the entertainment of the petition would constitute a prohibited suit against the State, both as

---

[8] Indeed, two Circuits interpreting the Bankruptcy Act, the predecessor to the current Bankruptcy Code, held that any partial waiver resulting from a proof of claim was limited to the amount of the proof of claim. *See Jones v. Yorke (In re Friendship Med. Center, Ltd.)*, 710 F.2d 1297, 1301 (7th Cir. 1983); *Ohio v. Madeline Marie Nursing Homes Nos. 1 & 2*, 694 F.2d 449, 462 (6th Cir. 1982).

respects the determination of the amount of the claim and its priority or lien."). This Court ultimately held that the State's sovereign immunity had been partially waived by the State's act of filing a proof of claim. *See id.* at 574.

However, the partial waiver of sovereign immunity was limited to the amount and adjudication of the State's proof of claim. *See id.* ("When the State becomes the actor and files a claim against the fund it waives any *immunity which it otherwise might have had respecting the adjudication of the claim.*") (emphasis added). Put another way, "if a state files a proof of claim, it waives immunity from any actions that are the equivalent of a compulsory counterclaim." Adam Feibelman, *Federal Bankruptcy Law and State Sovereign Immunity*, 81 Tex. L. Rev. 1381, 1401 (2003). This Court never held that the trustee could obtain an affirmative recovery from the State – a payment of money that was greater than the amount of the proof of claim. Nor did this Court hold that sovereign immunity had been waived for *all claims* against the State.[9] *Gardner*

[9] Of course, in enacting 11 U.S.C. § 106(c), Congress purported to redefine and expand the scope of the partial waiver of sovereign immunity that results from the filing a proof of claim. However, *College Savings Bank* casts serious doubt on the ability of Congress to declare that a particular action diminishes sovereign immunity or the extent of any resulting partial waiver. *See College Savings Bank*, 527 U.S. at 685-87. Similarly, a rule that the filing of a proof of claim constitutes a waiver of sovereign immunity for all claims would undermine the limits on Congress' power to abrogate the States' sovereign immunity. *See College Savings Bank*, 527 U.S. at 683 ("Recognizing a congressional power to exact constructive waivers of sovereign immunity through the exercise of Article I powers would also, as a practical matter, permit Congress to circumvent the antiabrogation holding of *Seminole Tribe*. Forced waiver and abrogation are not even different sides of the same coin – they are the same side of the same coin.").

did not involve any counter-claims and nothing in that case suggested a waiver for all claims.

Furthermore, a rule that the filing of a proof of claim constitutes a waiver of sovereign immunity for *all* claims has serious constitutional consequences. Generally, if a State wishes to collect a debt from a bankrupt entity, it must file a proof of claim. *See Hood II*, 541 U.S. at 447. Thus, if the filing of a proof of claim constitutes a waiver of sovereign immunity for *all* claims, then the State must choose between exercising its lawful right to collect a debt and waiving its sovereign immunity. Forcing a State to make such a choice is unconstitutional. *See College Savings Bank*, 527 U.S. at 687 ("In any event, we think where the constitutionally guaranteed protection of the States' sovereign immunity is involved, the point of coercion is automatically passed – and the voluntariness of waiver destroyed – when what is attached to the refusal to waive is the exclusion of the State from otherwise lawful activity.").

Thus, when Virginia Military Institute filed a proof of claim for $43,237.60, it exposed itself to the equivalent of a compulsory counter-claim for $43,237.60. Katz was free to pursue all defenses and claims, including a claim that Virginia Military Institute received a preferential transfer that arose out of the same transaction or occurrence, as long as the amount of recovery by Katz does not exceed $43,237.60. However, under any circumstances, Virginia Military Institute retains sovereign immunity for any amount over $43,237.60.[10]

[10] If this Court concludes that the filing of a proof of claim by a state agency waives sovereign immunity for all claims against that state agency, then there are serious questions regarding the authority

(Continued on following page)

B. When One State Agency Files a Proof of Claim in Bankruptcy, the Effects of That Filing May Not Be Extrapolated to Other State Agencies.

Regardless of the impact of Virginia Military Institute's filing of a proof of claim on Virginia Military Institute's sovereign immunity, it has no effect on the sovereign immunity of the other Petitioners – Central Virginia Community College, New River Community College, and Blue Ridge Community College.

Extrapolating the effects of filing a proof of claim from one agency to another is incompatible with the principle that "a waiver of sovereign immunity is to be strictly construed, in terms of its scope, in favor of the sovereign." *Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999). The rule of strict construction in favor of the sovereign demands that the effects of the filing of a proof of claim are limited to the state agency that filed the

---

of state employees to file proofs of claim on behalf of their agencies. To explain, under Virginia law, only the General Assembly has authority to waive the sovereign immunity of the Commonwealth and there can be no waiver by implication or by affirmative acts of individual officers or employees. *See Hinchey v. Ogden*, 307 S.E.2d 891, 895 (Va. 1983). Thus, if the filing of a proof of claim constitutes a waiver of sovereign immunity for all claims, then the Virginia Military Institute employee who filed the proof of claim had no authority to do so. Given that its employee committed an *ultra vires* act, Virginia Military Institute should be allowed to withdraw its proof of claim. It should not be bound by the *ultra vires* acts of its employees.

While the withdrawal of the proof of claim would result in a forfeiture of Virginia Military Institute's right to recover a debt, it would also result in a restoration of the sovereign immunity. *See Smith v. Dowden*, 47 F.3d 940, 944 (8th Cir. 1995) (When a creditor withdraws a proof of claim prior to the commencement of an adversary proceeding, the creditor's right to a jury trial is restored.).

claim. Moreover, extrapolation of the effects from one agency to another, so as to allow an affirmative recovery, is contrary to the idea that the filing a proof of claim allows counter-claims to be brought, at most, only as to claims arising out of the same transaction or occurrence. *See* 11 U.S.C. § 106(b). Thus, the effects of one state agency's filing of a proof of claim normally may not be extrapolated to another state agency or institution because separate transactions will be involved. *See Sacred Heart Hosp. v. Department of Pub. Welfare* (*In re Sacred Heart Hosp. of Norristown*), 204 B.R. 132, 142 (E.D. Pa. 1997); *William Ross, Inc. v. Biehn Constr., Inc.* (*In re Ross*), 199 B.R. 551, 556 (Bkr. W.D. Pa. 1996); *Bezner v. East Jersey State Prison* (*In re Exact Temp, Inc.*), 231 B.R. 566, 571 (Bkr. D.N.J. 1999); *Unicare Homes, Inc. v. Four Seasons Care Centers, Inc.* (*In re Four Seasons Care Centers, Inc.*), 119 B.R. 681, 683-684 (Bkr. D. Minn. 1990) (All holding that the filing of a proof of claim by one state agency does not waive the sovereign immunity of another state agency.). *But see Ossen v. Department of Social Servs.* (*In re Charter Oak Associates*), 361 F.3d 760, 772 (2nd Cir.) (Holding that, at least where the State acts as a unitary creditor, the filing of a proof of claim by one agency waives the sovereign immunity of the other agencies.), *cert. denied*, 125 S. Ct. 408 (2004).

IV. THE SUIT TO RECOVER PREFERENCES DOES NOT FALL WITHIN AN *IN REM* JURISDICTION EXCEPTION TO SOVEREIGN IMMUNITY.

In a final effort to avoid the question presented, Katz asserts that his attempt to recover preferences falls with an *in rem* jurisdiction exception to sovereign immunity. This argument was neither pressed nor passed on below

and should not be addressed by this Court. *See Matsushita Elec. Indus. Co.*, 516 U.S. at 379 n.5; *Heath*, 474 U.S. at 87. However, in the event that this Court chooses to address it, it should be rejected.

Katz' argument depends upon two propositions. First, a suit to recover preferences falls within the *in rem* jurisdiction of the bankruptcy court. Second, assuming that a suit to recover preferences does fall within the *in rem* jurisdiction of the bankruptcy court, there is a broad *in rem* exception to sovereign immunity. Neither proposition is valid.[11]

A. A Suit To Recover a Preferential Transfer Does Not Fall Within the Bankruptcy Court's *In Rem* Jurisdiction.

A suit to recover a preferential transfer does not fall within the bankruptcy court's *in rem* jurisdiction. *United States v. Nordic Vill.*, 503 U.S. 30, 38 (1992). This is so for two reasons. First, because a suit to recover a preferential transfer seeks "to recover a sum of money, not 'particular dollars,' . . . there [is] no *res* to which the court's *in rem* jurisdiction could [attach]." *Id.* at 38 (citation omitted). "A suit for payment of funds from the [State's] Treasury is quite different from a suit for the return of tangible property in which the debtor retained ownership." *Id.* at 39.

---

[11] Katz does not contend that his breach of contract claims fall within the bankruptcy court's *in rem* jurisdiction. Thus, regardless of whether the preference claims fall within an *in rem* exception to sovereign immunity, the breach of contract claims are not within such an exception.

Second, unlike an *in rem* proceeding, a suit to recover a preferential transfer does not bind the entire world. *See Hood II*, 541 U.S. at 448 (An *in rem* proceeding determines "all claims that anyone, whether named in the action or not, has to the property or thing in question. The proceeding is 'one against the world.'"). A suit to recover a preferential transfer does not seek a determination as to the debtor's status as a bankrupt, *see id.* at 453, but seeks to recover money. Indeed, preference actions, along with fraudulent conveyance actions, "are quintessentially suits at common law that more nearly resemble state-law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 56 (1989). *See also Schoenthal v. Irving Trust Co.*, 287 U.S. 92, 94-95 (1932) ("Suits to recover preferences constitute no part of the proceedings in bankruptcy *but concern controversies arising out of it.*") (emphasis added). *Cf. Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 71-72 (1982) (action to recover breach of contract claim so as to augment the bankruptcy estate is not a "public right."). In other words, the *in rem* determination of discharge, which is entered in the umbrella proceeding and is intended to be universally applicable, "is unlike an adversary proceeding by a bankruptcy trustee seeking to recover property in the State's hands on the grounds that the transfer was a voidable preference." *Hood II*, 541 U.S. at 454.

B. Sovereign Immunity Bars *In Rem* Proceedings.

Regardless of whether Katz' suits to recover preferential transfers can be regarded as *in rem* proceedings, sovereign immunity bars any effort to recover a preferential transfer. *Nordic Vill.*, 503 U.S. at 38-39; *Hoffman v. Connecticut Dep't of Income Maint.*, 492 U.S. 96, 100 (1989).

First, despite Katz' assertions, *Hood II* did not establish a general bankruptcy *in rem* exception to sovereign immunity. To the contrary, *Hood II* merely held that a bankruptcy "court's exercise of its *in rem* jurisdiction to discharge a student loan debt is not an affront to the sovereignty of the State." *Hood II*, 541 U.S. at 451 n.5. It did not establish a broad rule and it has no application outside of the discharge of student loans owed to a State. Indeed, this Court disclaimed the creation of such an exception and explicitly suggested that there may be exercises of a bankruptcy court's *in rem* jurisdiction that are barred by sovereign immunity. *Id.* ("This is not to say, 'a bankruptcy court's *in rem* jurisdiction overrides sovereign immunity,'. . . . Nor do we hold that every exercise of a bankruptcy court's *in rem* jurisdiction will not offend the sovereignty of the State.").

Second, the distinction between *in rem* jurisdiction and *in personam* jurisdiction is irrelevant for constitutional purposes. *See Shaffer v. Heitner*, 433 U.S. 186, 207 (1977) (The constitutional test for whether a state court may exercise jurisdiction is the same regardless of whether jurisdiction is *in rem* or *in personam*.). Thus, to the extent that sovereign immunity bars an *in personam* proceeding, it will also bar an *in rem* proceeding. *Missouri v. Fiske*, 290 U.S. 18, 28 (1933) ("The fact that a suit in a

federal court is *in rem*, or *quasi in rem*, furnishes *no ground* for the issue of process against a non-consenting state.") (emphasis added). Consequently, this Court has "never applied an *in rem* exception to the sovereign-immunity bar against monetary recovery, and [has] suggested that no such exception exists." *Nordic Vill.*, 503 U.S. at 38. Moreover, sovereign immunity "bars federal jurisdiction over general title disputes relating to State property interests." *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 506 (1998). *See also Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 281 (1997) ("It is common ground between the parties, at this stage of the litigation, that the Tribe could not maintain a quiet title suit against Idaho in federal court, absent the State's consent."); *id.* at 291 (O'Connor, J., joined by Scalia & Thomas, J.J., concurring) (Sovereign immunity bars action "because a ruling in the Tribe's favor, in practical effect, would be indistinguishable from an order granting the Tribe title to submerged lands."); *id.* at 305 (Souter, J., joined by Stevens, Ginsburg, & Breyer, J.J., dissenting) ("[W]e have of course drawn the jurisdictional line short of ultimately quieting title. . . .").

Third, while this Court has held that sovereign immunity did not bar *in rem* proceeding in certain circumstances, *see Deep Sea Research*, 523 U.S. at 506; *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 210-11 (1983); *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 691-92 (1982), these decisions do not establish a broad general *in rem* exception to sovereign immunity. As this Court explained, *Whiting Pools, Inc.* simply "upheld a Bankruptcy Court order that the IRS turn over tangible property of the debtor it had seized before the debtor filed for bankruptcy protection. A suit for payment of funds from the Treasury is quite different from a suit for the

return of tangible property in which the debtor retained ownership." *Nordic Vill.*, 503 U.S. at 38-39. Moreover the admiralty decisions – *Deep Sea Research* and *Treasure Salvors* – involved situations where the State did not have possession of the res, *Deep Sea Research*, 523 U.S. at 494-95, or lacked a colorable claim of title to the res, *Treasure Salvors*, 458 U.S. at 697. Where, as here, the State has possession of the money and there is no dispute that the State is entitled to the money, *Deep Sea Research* and *Treasure Salvors* have no applicability.

CONCLUSION

For the reasons stated above, in the *Brief of the Petitioners*, and in the *Amici* Briefs supporting the Petitioners, the judgment of the United States Court of Appeals for the Sixth Circuit – that Congress may use the Article I Bankruptcy Clause to abrogate the States' sovereign immunity – should be **REVERSED**.

Respectfully submitted,

JUDITH WILLIAMS JAGDMANN
Attorney General of Virginia

WILLIAM E. THRO
State Solicitor General
Counsel of Record

MATTHEW M. COBB
CARLA R. COLLINS
ERIC A. GREGORY
JOEL C. HOPPE
COURTNEY M. MALVEAUX
VALERIE L. MYERS
A. CAMERON O'BRION
RONALD N. REGNERY
D. MATHIAS ROUSSY, JR.
WILLIAM R. SIEVERS
Associate State
Solicitors General

BERNARD L. MCNAMEE II
Chief Deputy
Attorney General

MAUREEN RILEY MATSEN
Deputy Attorney General

BRIAN J. GOODMAN
CYNTHIA H. NORWOOD
Assistant Attorneys General

OFFICE OF THE
ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
Telephone: (804) 786-2436
Facsimile: (804) 786-1991

Counsel for the Petitioners

September 26, 2005

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

CENTRAL VIRGINIA COMMUNITY COLLEGE ET AL. *v.* KATZ, LIQUIDATING SUPERVISOR FOR WALLACE'S BOOKSTORES, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 04–885. Argued October 31, 2005—Decided January 23, 2006

The Bankruptcy Clause, Art. I, §8, cl. 4, empowers Congress to establish "uniform Laws on the subject of Bankruptcies throughout the United States." In *Tennessee Student Assistance Corporation* v. *Hood*, 541 U. S. 440, this Court, without reaching the question whether the Clause gives Congress the authority to abrogate States' immunity from private suits, see *id.*, at 443, upheld the application of the Bankruptcy Code, 11 U. S. C. §101 *et seq.*, to proceedings initiated by a debtor against a state agency to determine the dischargeability of a student loan debt, see 541 U. S., at 451. In this case, a proceeding commenced by respondent Bankruptcy Trustee under §§547(b) and 550(a) to avoid and recover alleged preferential transfers by the debtor to petitioner state agencies, the agencies claim that the proceeding is barred by sovereign immunity. The Bankruptcy Court denied petitioners' motions to dismiss on that ground, and the District Court and the Sixth Circuit affirmed based on the Circuit's prior determination that Congress has abrogated the States' sovereign immunity in bankruptcy proceedings.

Held: A bankruptcy trustee's proceeding to set aside the debtor's preferential transfers to state agencies is not barred by sovereign immunity. Pp. 3–22.

(a) The Bankruptcy Clause's history, the reasons it was adopted, and the legislation proposed and enacted under it immediately following ratification demonstrate that it was intended not just as a grant of legislative authority to Congress, but also to authorize limited subordination of state sovereign immunity in the bankruptcy

Syllabus

arena. Although statements in *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, reflect an assumption that that case's holding would apply to the Clause, careful study and reflection convince this Court that that assumption was erroneous. The Court is not bound to follow its dicta in a prior case in which the point at issue was not fully debated. *Cohens* v. *Virginia*, 6 Wheat. 264, 399–400. Pp. 4–5.

(b) States, whether or not they choose to participate, are bound by a bankruptcy court's order discharging the debtor no less than are other creditors. *Hood*, 541 U. S., at 448. Petitioners here, like the state agency parties in *Hood*, have conceded as much. See *id.*, at 449. The history of discharges in bankruptcy proceedings demonstrates that these concessions, and *Hood*'s holding, are correct. The Framers' primary goal in adopting the Clause was to prevent competing sovereigns' interference with discharge: The patchwork of wildly divergent and uncoordinated insolvency and bankruptcy laws that existed in the American Colonies resulted in one jurisdiction's imprisoning debtors discharged (from prison and of their debts) in and by another jurisdiction. The absence of extensive debate at the Convention over the Clause's text or its insertion into the Constitution indicates that there was general agreement on the importance of authorizing a uniform federal response to the problems and injustice that system created. Pp. 5–11.

(c) Bankruptcy jurisdiction, as understood today and at the framing, is principally *in rem*. See, *e.g.*, *Hood*, 541 U. S., at 447. It thus does not implicate States' sovereignty to nearly the same degree as other kinds of jurisdiction. See *id.*, at 450–451. The Framers would have understood the Bankruptcy Clause's grant of power to enact laws on the entire "subject of Bankruptcies" to include laws providing, in certain limited respects, for more than simple adjudications of rights in the res. Courts adjudicating disputes concerning bankrupts' estates historically have had the power to issue ancillary orders enforcing their *in rem* adjudications. See, *e.g.*, *id.*, at 455–456. The interplay between *in rem* adjudications and orders ancillary thereto is also evident in this case. Whether or not actions such as this are properly characterized as *in rem*, those who crafted the Bankruptcy Clause would have understood it to give Congress the power to authorize courts to avoid preferential transfers and to recover the transferred property. Pp. 12–15.

(d) Insofar as orders ancillary to the bankruptcy courts' *in rem* jurisdiction, like orders directing turnover of preferential transfers, implicate States' sovereign immunity from suit, the States agreed in the plan of the Constitutional Convention not to assert that immunity. That is evidenced not only by the Bankruptcy Clause's history, but also by legislation considered and enacted in the immediate wake of

Syllabus

the Constitution's ratification. For example, the Bankruptcy Act of 1800 specifically granted federal courts habeas authority to release debtors from state prisons at a time when state sovereign immunity was preeminent among the Nation's concerns, yet there appears to be no record of any objection to that grant based on an infringement of sovereign immunity. This history demonstrates that the power to enact bankruptcy legislation was understood to carry with it the power to subordinate state sovereignty, albeit within a limited sphere. Pp. 15–21.

(e) The Court need not consider the question *Hood* left open: whether Congress' attempt to "abrogat[e]" state sovereign immunity in 11 U. S. C. §106(a) is valid. The relevant question is not abrogation, but whether Congress' determination that States should be amenable to preferential transfer proceedings is within the scope of its power to enact "Laws on the subject of Bankruptcies." Beyond peradventure, it is. Congress' power, at its option, either to treat States in the same way as other creditors or exempt them from the operation of bankruptcy laws arises from the Clause itself; the relevant "abrogation" is the one effected in the plan of the Convention, not by statute. Pp. 21–22.

106 Fed. Appx. 341, affirmed.

STEVENS, J., delivered the opinion of the Court, in which O'CONNOR, SOUTER, GINSBURG, and BREYER, JJ., joined. THOMAS, J., filed a dissenting opinion, in which ROBERTS, C. J., and SCALIA and KENNEDY, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 04–885

CENTRAL VIRGINIA COMMUNITY COLLEGE, ET AL., PETITIONERS *v.* BERNARD KATZ, LIQUIDATING SUPERVISOR FOR WALLACE'S BOOKSTORES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[January 23, 2006]

JUSTICE STEVENS delivered the opinion of the Court.

Article I, §8, cl. 4, of the Constitution provides that Congress shall have the power to establish "uniform Laws on the subject of Bankruptcies throughout the United States." In *Tennessee Student Assistance Corporation* v. *Hood*, 541 U. S. 440 (2004), we granted certiorari to determine whether this Clause gives Congress the authority to abrogate States' immunity from private suits. See *id.*, at 443. Without reaching that question, we upheld the application of the Bankruptcy Code to proceedings initiated by a debtor against a state agency to determine the dischargeability of a student loan debt. See *id.*, at 451. In this case we consider whether a proceeding initiated by a bankruptcy trustee to set aside preferential transfers by the debtor to state agencies is barred by sovereign immunity. Relying in part on our reasoning in *Hood*, we reject the sovereign immunity defense advanced by the state agencies.

I

Petitioners are Virginia institutions of higher education

that are considered "arm[s] of the State" entitled to sovereign immunity. See, *e.g.*, *Alden* v. *Maine*, 527 U. S. 706, 756 (1999) (observing that only arms of the State can assert the State's immunity). Wallace's Bookstores, Inc., did business with petitioners before it filed a petition for relief under chapter 11 of the Bankruptcy Code, 11 U. S. C. §101 *et seq.* (2000 ed. and Supp. III), in the United States Bankruptcy Court for the Eastern District of Kentucky. Respondent, Bernard Katz, is the court-appointed liquidating supervisor of the bankrupt estate. He has commenced proceedings in the Bankruptcy Court pursuant to §§547(b) and 550(a) to avoid and recover alleged preferential transfers to each of the petitioners made by the debtor when it was insolvent.[1] Petitioners' motions to dismiss those proceedings on the basis of sovereign immunity were denied by the Bankruptcy Court.

The denial was affirmed by the District Court and the

---

[1] A preferential transfer is defined as "any transfer of an interest of the debtor in property—

"(1) to or for the benefit of a creditor;

"(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

"(3) made while the debtor was insolvent;

"(4) made—

"(A) on or within 90 days before the date of the filing of the petition; or

"(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

"(5) that enables such creditor to receive more than such creditor would receive if—

"(A) the case were a case under chapter 7 of this title;

"(B) the transfer had not been made; and

"(C) such creditor received payment of such debt to the extent provided by the provisions of this title." 11 U. S. C. §547(b).

Respondent also instituted adversary proceedings against some of the petitioners to collect accounts receivable. He has, however, filed a letter with this Court indicating his intent not to pursue those claims further.

Court of Appeals for the Sixth Circuit on the authority of the Sixth Circuit's prior determination that Congress has abrogated the States' sovereign immunity in bankruptcy proceedings. See *Hood* v. *Tennessee Student Assistance Corporation (In re Hood)*, 319 F. 3d 755 (2003). We granted certiorari, 544 U. S. ___ (2005), to consider the question left open by our opinion in *Hood:* whether Congress' attempt to abrogate state sovereign immunity in 11 U. S. C. §106(a)[2] is valid. As we shall explain, however,

---

[2]Section 106(a), as amended in 1994, provides in part as follows:

"Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit . . . with respect to the following:

"(1) Sections 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 728, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this title.

"(2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.

"(3) The court may issue against a governmental unit an order, process, or judgment under such sections of the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery, but not including an award of punitive damages. . . ."

The term "governmental unit" is defined to include a "State," a "municipality," and a "department, agency, or instrumentality of . . . a State." §101(27).

The above-quoted version of §106(a) is the product of revisions made in the wake of some of our precedents. The Bankruptcy Reform Act of 1978, 92 Stat. 2549, contained a provision indicating only that "governmental unit[s]," defined to include States, were deemed to have "waived sovereign immunity" with respect to certain proceedings in bankruptcy and to be bound by a court's determinations under certain provisions of the Act "notwithstanding any assertion of sovereign immunity." *Id.*, at 2555–2556. This Court's decisions in *Hoffman* v. *Connecticut Dept. of Income Maintenance*, 492 U. S. 96 (1989), and *United States* v. *Nordic Village, Inc.*, 503 U. S. 30 (1992), which held that Congress had failed to make sufficiently clear in the predecessor to §106(a) its intent either to "abrogate" state sovereign immunity or to waive the Federal Government's immunity, see 492 U. S., at 101; 503 U. S., at 39, prompted Congress in 1994 to enact the text of §106(a) now

we are persuaded that the enactment of that provision was not necessary to authorize the Bankruptcy Court's jurisdiction over these preference avoidance proceedings.

Bankruptcy jurisdiction, at its core, is *in rem*. See *Gardner* v. *New Jersey*, 329 U. S. 565, 574 (1947) ("The whole process of proof, allowance, and distribution is, shortly speaking, an adjudication of interests claimed in a *res*"). As we noted in *Hood*, it does not implicate States' sovereignty to nearly the same degree as other kinds of jurisdiction. See 541 U. S., at 450–451 (citing admiralty and bankruptcy cases). That was as true in the 18th century as it is today. Then, as now, the jurisdiction of courts adjudicating rights in the bankrupt estate included the power to issue compulsory orders to facilitate the administration and distribution of the res.

It is appropriate to presume that the Framers of the Constitution were familiar with the contemporary legal context when they adopted the Bankruptcy Clause[3]—a provision which, as we explain in Part IV, *infra*, reflects the States' acquiescence in a grant of congressional power to subordinate to the pressing goal of harmonizing bankruptcy law sovereign immunity defenses that might have been asserted in bankruptcy proceedings. The history of the Bankruptcy Clause, the reasons it was inserted in the Constitution, and the legislation both proposed and enacted under its auspices immediately following ratification

---

in force. See generally Gibson, Congressional Response to *Hoffman* and *Nordic Village*: Amended Section 106 and Sovereign Immunity, 69 Am. Bankr. L. J. 311 (1995).

[3]In *Cannon* v. *University of Chicago*, 441 U. S. 677, 699 (1979), we endorsed the presumption "that Congress was thoroughly familiar" with contemporary law when it enacted Title IX of the Civil Rights Act of 1964. It is equally proper to presume that the delegates to the Constitutional Convention were fully aware of the potential for injustice, discussed in Part II, *infra*, presented by the nonuniform state laws authorizing imprisonment as a remedy for the nonpayment of an insolvent's debts.

of the Constitution demonstrate that it was intended not just as a grant of legislative authority to Congress, but also to authorize limited subordination of state sovereign immunity in the bankruptcy arena. Foremost on the minds of those who adopted the Clause were the intractable problems, not to mention the injustice, created by one State's imprisoning of debtors who had been discharged (from prison and of their debts) in and by another State. As discussed below, to remedy this problem, the very first Congresses considered, and the Sixth Congress enacted, bankruptcy legislation authorizing federal courts to, among other things, issue writs of habeas corpus directed at state officials ordering the release of debtors from state prisons.

We acknowledge that statements in both the majority and the dissenting opinions in *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44 (1996), reflected an assumption that the holding in that case would apply to the Bankruptcy Clause. See also *Hoffman* v. *Connecticut Dept. of Income Maintenance*, 492 U. S. 96, 105 (1989) (O'CONNOR, J., concurring). Careful study and reflection have convinced us, however, that that assumption was erroneous. For the reasons stated by Chief Justice Marshall in *Cohens* v. *Virginia*, 6 Wheat. 264 (1821), we are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated. See *id.*, at 399–400 ("It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision").

II

Critical features of every bankruptcy proceeding are the

exercise of exclusive jurisdiction over all of the debtor's property, the equitable distribution of that property among the debtor's creditors, and the ultimate discharge that gives the debtor a "fresh start" by releasing him, her, or it from further liability for old debts. See, *e.g.*, *Local Loan Co.* v. *Hunt*, 292 U. S. 234, 244 (1934). "Under our longstanding precedent, States, whether or not they choose to participate in the proceeding, are bound by a bankruptcy court's discharge order no less than other creditors." *Hood*, 541 U. S., at 448. Petitioners here, like the state agencies that were parties in *Hood*, have conceded as much. See *id.*, at 449 (noting concession that "States are generally bound by a bankruptcy court's discharge order"); Tr. of Oral Arg. 8–9 (Oct. 31, 2005).

The history of discharges in bankruptcy proceedings demonstrates that the state agencies' concessions, and *Hood*'s holding, are correct. The term "discharge" historically had a dual meaning; it referred to both release of debts and release of the debtor from prison. Indeed, the earliest English statutes governing bankruptcy and insolvency authorized discharges of persons, not debts. One statute enacted in 1649 was entitled "An act for discharging Poor Prisoners unable to satisfy their creditors." See 2 Acts and Ordinances of the Interregnum, 1642–1660, pp. 240–241 (C. Firth & R. Rait eds. 1911). The stated purpose of the Act was to "Discharge . . . the person of [the] Debtor" "of and from his or her Imprisonment." *Ibid.* Not until 1705 did the English Parliament extend the discharge (and then only for traders and merchants) to include release of debts. See 4 Ann., ch. 17, §7 (providing that upon compliance with the statute, "all and every person and persons so becoming bankrupt . . . shall be discharged from all debts by him, her, or them due and owing at the time that he, she, or they did become bankrupt"); see also McCoid, Discharge: The Most Important Development in Bankruptcy History, 70 Am. Bankr. L. J.

163, 167 (1996).

Well into the 18th century, imprisonment for debt was still ubiquitous in England[4] and the American Colonies. Bankruptcy and insolvency laws remained as much concerned with ensuring full satisfaction of creditors (and, relatedly, preventing debtors' flight to parts unknown[5]) as with securing new beginnings for debtors. Illustrative of bankruptcy laws' harsh treatment of debtors during this period was that debtors often fared worse than common criminals in prison; unfortunate insolvents, unlike criminals, were forced to provide their own food, fuel, and clothing while behind bars. See B. Mann, Republic of Debtors: Bankruptcy in the Age of American Independence 78–108 (2002).

Common as imprisonment itself was, the American Colonies, and later the several States, had wildly divergent schemes for discharging debtors and their debts. *Id.*, at 79 ("The only consistency among debt laws in the eighteenth century was that every colony, and later every state, permitted imprisonment for debt—most on *mesne* process, and all on execution of a judgment"). At least four jurisdictions offered relief through private Acts of their legislatures. See *Railway Labor Executives' Assn.* v. *Gibbons*, 455 U. S. 457, 472 (1982). Those Acts released debtors from prison upon surrender of their property, and many coupled the release from prison with a discharge of debts. Other jurisdictions enacted general laws providing for

---

[4]Imprisonment for debt was not abolished in England until 1869, and then only subject to certain exceptions. See Debtors Act, 1869, 32 & 33 Vict., ch. 62, §4; see also Cohen, The History of Imprisonment for Debt and its Relation to the Development of Discharge in Bankruptcy, 3 J. Leg. Hist. 153, 164 (1982).

[5]The legislation widely acknowledged to be the first English bankruptcy statute, 34 & 35 Hen. 8, ch. 4, §1 (1542), contained a provision explaining that the statute was needed to deal with the growing number of debtors who, after "craftily obtaining into their Hands great Substance of other Men's Goods, do suddenly flee to Parts unknown."

release from prison and, in a few places, discharge of debt. Others still granted release from prison, but only in exchange for indentured servitude. Some jurisdictions provided no relief at all for the debtor. See generally P. Coleman, Debtors and Creditors in America: Insolvency, Imprisonment for Debt, and Bankruptcy, 1607–1900 (1999).[6]

The difficulties posed by this patchwork of insolvency and bankruptcy laws were peculiar to the American experience. In England, where there was only one sovereign, a single discharge could protect the debtor from his jailer and his creditors. As two cases—one litigated before the Constitutional Convention in Philadelphia and one litigated after it—demonstrate, however, the uncoordinated actions of multiple sovereigns, each laying claim to the debtor's body and effects according to different rules, rendered impossible so neat a solution on this side of the Atlantic.

In the first case, *James* v. *Allen*, 1 Dall. 188 (C. P. Phila. Cty. 1786), Jared Ingersoll, an attorney who a year later would become a delegate to the Philadelphia Convention,[7]

---

[6] "At the time of the Revolution, only three of the thirteen colonies . . . had laws discharging insolvents of their debts. No two of these relief systems were alike in anything but spirit. In four of the other ten colonies, insolvency legislation was either never enacted or, if enacted, never went into effect, and in the remaining six colonies, full relief was available only for scattered, brief periods, usually on an *ad hoc* basis to named insolvents." Coleman, Debtors and Creditors in America, at 14.

[7] Ingersoll was admitted to the Philadelphia bar in 1773 and elected a member of the Continental Congress in 1780. After serving as a delegate to the Constitutional Convention, he became a member of the Philadelphia Common Council. He served as attorney general of Pennsylvania from 1790 to 1799 and again from 1811 to 1817. From March 1821 until his death in 1822 he served as a judge in the District Court for the City and County of Philadelphia. Among the cases he litigated before this Court was *Chisholm* v. *Georgia*, 2 Dall. 419 (1793)—for the State of Georgia, see *ibid.* See also 9 Dictionary of American Biography 468–469 (1932).

represented a Pennsylvania creditor seeking recovery from a debtor who had been released from prison in New Jersey. Shortly after his release, the debtor traveled to Pennsylvania, where he was arrested for nonpayment of the Pennsylvania debt. In seeking release from the Pennsylvania prison, he argued that his debt had been discharged by the New Jersey court. Ingersoll responded that the order granting relief under New Jersey's insolvency laws "only discharged the person of the debtor from arrest within the State of New Jersey." *Id.*, at 190. The court agreed: Whatever effect the order might have had in New Jersey, the court said, it "goes no further than to discharge [the debtor] from his imprisonment in the Gaol of Essex County in the State of New Jersey; which, if the fullest obedience were paid to it, could not authorize a subsequent discharge from imprisonment in another Gaol, in another State." *Id.*, at 192. The court further observed that "[i]nsolvent laws subsist in every State in the Union, and are probably all different from each other . . . . Even the Bankrupt Laws of England, while we were the subjects of that country, were never supposed to extend here, so as to exempt the persons of the Bankrupts from being arrested." *Id.*, at 191.

In the second case, *Millar* v. *Hall*, 1 Dall. 229 (Pa. 1788), which was decided the year after the Philadelphia Convention, Ingersoll found himself arguing against the principle announced in *James*. His client, a debtor named Hall, had been "discharged under an insolvent law of the state of Maryland, which is in the nature of a general bankrupt[cy] law." 1 Dall., at 231. Prior to his discharge, Hall had incurred a debt to a Pennsylvanian named Millar. Hall neglected to mention that debt in his schedule of creditors presented to the Maryland court, or to personally notify Millar of the looming discharge. Following the Maryland court's order, Hall traveled to Pennsylvania and was promptly arrested for the unpaid debt to Millar.

Responding to Millar's counsel's argument that the holding of *James* controlled, Ingersoll urged adoption of a rule that "the discharge of the Defendant in one state ought to be sufficient to discharge [a debtor] in every state." 1 Dall., at 231. Absent such a rule, Ingersoll continued, "perpetual imprisonment must be the lot of every man who fails; and all hope of retrieving his losses by honest and industrious pursuits, will be cut off from the unfortunate bankrupt." *Ibid.* The court accepted this argument. Allowing a creditor to execute "upon [a debtor's] person out of the state in which he has been discharged," the court explained, "would be giving a superiority to some creditors, and affording them a double satisfactior –to wit, a proportionable dividend of his property there, and the imprisonment of his person here." *Id.*, at 232. Indeed, the debtor having already been obliged to surrender all of his effects, "to permit the taking [of] his person here, would be to attempt to compel him to perform an impossibility, that is, to pay a debt after he has been deprived of every means of payment,—an attempt which would, at least, amount to perpetual imprisonment, unless the benevolence of his friends should interfere to discharge [his] account." *Ibid.*

These two cases illustrate the backdrop against which the Bankruptcy Clause was adopted. In both *James* and *Millar*, the debtors argued that the earlier discharge should be given preclusive effect pursuant to the Full Faith and Credit Clause of the Articles of Confederation. See *James*, 1 Dall., at 190; *Millar*, 1 Dall., at 231. That possibility was the subject of discussion at the Constitutional Convention when a proposal to encompass legislative Acts, and insolvency laws in particular, within the coverage of the Full Faith and Credit Clause of the Constitution was committed to the Committee of Detail[8] together

---

[8]The Committee of Detail was created by the Convention on July 25.

with a proposal "'[t]o establish uniform laws upon the subject of bankruptcies, and respecting the damages arising on the protest of foreign bills of exchange.'" See Nadelmann, On the Origin of the Bankruptcy Clause, 1 Am. J. Legal Hist. 215, 216–217, 219 (1957); see also Plank, The Constitutional Limits of Bankruptcy, 63 Tenn. L. Rev. 487, 527–528 (1996). A few days after this proposal was taken under advisement, the Committee of Detail reported that it had recommended adding the power "'[t]o establish uniform laws upon the subject of bankruptcies'" to the Naturalization Clause of what later became Article I.

The Convention adopted the Committee's recommendation with very little debate two days later. Roger Sherman of Connecticut alone voted against it, apparently because he was concerned that it would authorize Congress to impose upon American citizens the ultimate penalty for debt then in effect in England: death. See J. Madison, Notes of Debates in the Federal Convention of 1787, p. 571 (Ohio Univ. Press ed. 1966). The absence of extensive debate over the text of the Bankruptcy Clause or its insertion indicates that there was general agreement on the importance of authorizing a uniform federal response to the problems presented in cases like *James* and *Millar*.[9]

1787, to prepare a draft text of the Constitution based on delegates' proposals.

[9]Of course, the Bankruptcy Clause, located as it is in Article I, is "'intimately connected'" not just with the Full Faith and Credit Clause, which appears in Article IV of the Constitution, but also with the Commerce Clause. See *Railway Labor Executives' Assn.* v. *Gibbons*, 455 U. S. 457, 466 (1982) (quoting The Federalist No. 42, p. 285 (N. Y. Heritage Press 1945)). That does not mean, however, that the state sovereign immunity implications of the Bankruptcy Clause necessarily mirror those of the Commerce Clause. Indeed, the Bankruptcy Clause's unique history, combined with the singular nature of bankruptcy courts' jurisdiction, discussed *infra*, have persuaded us that the ratification of the Bankruptcy Clause does represent a surrender by the

III

Bankruptcy jurisdiction, as understood today and at the time of the framing, is principally *in rem* jurisdiction. See *Hood*, 541 U. S., at 447; *Local Loan Co.*, 292 U. S., at 241; *Straton* v. *New*, 283 U. S. 318, 320–321 (1931); *Hanover Nat. Bank* v. *Moyses*, 186 U. S. 181, 192 (1902); *New Lamp Chimney Co.* v. *Ansonia Brass & Copper Co.*, 91 U. S. 656, 661–662 (1876). In bankruptcy, "the court's jurisdiction is premised on the debtor and his estate, and not on the creditors." *Hood*, 541 U. S., at 447. As such, its exercise does not, in the usual case, interfere with state sovereignty even when States' interests are affected. See *id.*, at 448.

The text of Article I, §8, cl. 4, of the Constitution, however, provides that Congress shall have the power to establish "uniform Laws on the subject of Bankruptcies throughout the United States." Although the interest in avoiding unjust imprisonment for debt and making federal discharges in bankruptcy enforceable in every State was a primary motivation for the adoption of that provision, its coverage encompasses the entire "subject of Bankruptcies." The power granted to Congress by that Clause is a unitary concept rather than an amalgam of discrete segments.

The Framers would have understood that laws "on the subject of Bankruptcies" included laws providing, in certain limited respects, for more than simple adjudications of rights in the res. The first bankruptcy statute, for example, gave bankruptcy commissioners appointed by the district court the power, *inter alia*, to imprison recalcitrant third parties in possession of the estate's assets. See Bankruptcy Act of 1800, §14, 2 Stat. 25 (repealed 1803).

States of their sovereign immunity in certain federal proceedings. That conclusion is implicit in our holding in *Tennessee Student Assistance Corporation* v. *Hood*, 541 U. S. 440 (2004).

More generally, courts adjudicating disputes concerning bankrupts' estates historically have had the power to issue ancillary orders enforcing their *in rem* adjudications. See, *e.g.*, 2 W. Blackstone, Commentaries on the Laws of England 486 (1766) (noting that the assignees of the bankrupt's property—the 18th-century counterparts to today's bankruptcy trustees—could "pursue any *legal* method of recovering [the debtor's] property so vested in them," and could pursue methods in equity with the consent of the creditors); Plank, 63 Tenn. L. Rev., at 523 (discussing State insolvency and bankruptcy laws in the 18th century empowering courts to recover preferential transfers); see also *Ex parte Christy*, 3 How. 292, 312, 314 (1844) (Story, J.) (describing bankruptcy jurisdiction under the 1841 Act in broad terms); *Wright* v. *Union Central Life Ins. Co.*, 304 U. S. 502, 513–514 (1938) (defining "bankruptcy" as the "'subject of the relations between an insolvent or nonpaying or fraudulent debtor and his creditors, *extending to his and their relief*" (emphasis added)).

Our decision in *Hood* illustrates the point. As the dissenters in that case pointed out, it was at least arguable that the particular procedure that the debtor pursued to establish dischargeability of her student loan could have been characterized as a suit against the State rather than a purely *in rem* proceeding. See 541 U. S., at 455–456 (THOMAS, J., dissenting). But because the proceeding was merely ancillary to the Bankruptcy Court's exercise of its *in rem* jurisdiction, we held that it did not implicate state sovereign immunity. The point is also illustrated by Congress' early grant to federal courts of the power to issue *in personam* writs of habeas corpus directing States to release debtors from state prisons, discussed in Part IV, *infra*. See *Braden* v. *30th Judicial Circuit Court of Ky.*, 410 U. S. 484, 494–495 (1973) ("The writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful

custody").

The interplay between *in rem* adjudications and orders ancillary thereto is evident in the case before us. Respondent first seeks a determination under 11 U. S. C. §547 that the various transfers made by the debtor to petitioners qualify as voidable preferences. The §547 determination, standing alone, operates as a mere declaration of avoidance. That declaration may be all that the trustee wants; for example, if the State has a claim against the bankrupt estate, the avoidance determination operates to bar that claim until the preference is turned over. See §502(d). In some cases, though, the trustee, in order to marshal the entirety of the debtor's estate, will need to recover the subject of the transfer pursuant to §550(a). A court order mandating turnover of the property, although ancillary to and in furtherance of the court's *in rem* jurisdiction, might itself involve *in personam* process.

As we explain in Part IV, *infra*, it is not necessary to decide whether actions to recover preferential transfers pursuant to §550(a) are themselves properly characterized as *in rem*.[10] Whatever the appropriate appellation, those

---

[10]The proper characterization of such actions is not as clear as petitioners suggest. The Court in *Nordic Village, Inc.*, 503 U. S., at 38, stated, as an alternative basis for rejecting a bankruptcy trustee's argument that a suit to avoid a preferential transfer made to the Internal Revenue Service was an action *in rem*, that any *in rem* "exception" to sovereign immunity was unavailable in that case because the trustee sought to recover a "sum of money, not 'particular dollars.'" There was, in the Court's view, "no *res* to which the [bankruptcy] court's *in rem* jurisdiction could have attached." *Ibid.* In making that determination, the Court distinguished our earlier decision in *United States* v. *Whiting Pools, Inc.*, 462 U. S. 198 (1983), which held that the debtor's "estate," the res, "includes property of the debtor that has been seized by a creditor prior to the filing of a [bankruptcy] petition." *Id.*, at 209; see also *Begier* v. *IRS*, 496 U. S. 53, 58 (1990) ("'property of the debtor' subject to the preferential transfer provision is best understood as that property that would have been part of the estate had it not been transferred before the commencement of bankruptcy proceedings"). We

who crafted the Bankruptcy Clause would have understood it to give Congress the power to authorize courts to avoid preferential transfers and to recover the transferred property. Petitioners do not dispute that that authority has been a core aspect of the administration of bankrupt estates since at least the 18th century. See, *e.g.*, *Rust* v. *Cooper*, 2 Cowp. 629, 633–634, 98 Eng. Rep. 1277, 1280 (K. B. 1777); *Alderson* v. *Temple*, 1 Black. W. 660, 661–663, 96 Eng. Rep. 384, 385 (K. B. 1768); see also McCoid, Bankruptcy, Preferences, and Efficiency: An Expression of Doubt, 67 Va. L. Rev. 249, 251–253 (1981) (discussing English precedents, dating back to Sir Edward Coke's discussion in *The Case of Bankrupts*, 2 Co. Rep. 25a, 76 Eng. Rep. 441 (K. B. 1589), addressing bankruptcy commissioners' power to avoid preferences); *In re Dehon, Inc.*, 327 B. R. 38, 62–65 (Bkrtcy. Ct. Mass. 2005) (collecting historical materials). And it, like the authority to issue writs of habeas corpus releasing debtors from state prisons, see Part IV, *infra*, operates free and clear of the State's claim of sovereign immunity.

IV

Insofar as orders ancillary to the bankruptcy courts' *in rem* jurisdiction, like orders directing turnover of preferential transfers, implicate States' sovereign immunity from suit, the States agreed in the plan of the Convention not to assert that immunity. So much is evidenced not only by the history of the Bankruptcy Clause, which shows that the Framers' primary goal was to prevent competing sovereigns' interference with the debtor's discharge, see

---

observe that the trustee in this case, unlike the one in *Nordic Village*, seeks, in the alternative, both return of the "value" of the preference, see 11 U. S. C. §550(a), and return of the actual "property transferred," *ibid.* See Brief for Respondent 37 ("Respondent invokes the *in rem* jurisdiction of the bankruptcy court to recover under section 550 'the property transferred'").

Part II, *supra*, but also by legislation considered and enacted in the immediate wake of the Constitution's ratification.

Congress considered proposed legislation establishing uniform federal bankruptcy laws in the first and each succeeding Congress until 1800, when the first Bankruptcy Act was passed. See C. Warren, Bankruptcy in United States History 10 (1935) ("[I]n the very first session of the 1st Congress, during which only the most necessary subjects of legislation were considered, bankruptcy was one of those subjects; and as early as June 1, 1789, a Committee of the House was named to prepare a bankruptcy bill"). The Bankruptcy Act of 1800 was in many respects a copy of the English bankruptcy statute then in force. It was, like the English law, chiefly a measure designed to benefit creditors. Like the English statute, its principal provisions permitted bankruptcy commissioners, on appointment by a federal district court, to arrest the debtor, see §4, 2 Stat. 22; to "cause the doors of the dwelling-house of [the] bankrupt to be broken," §4, *id.*, at 23–24; to seize and collect the debtor's assets, §5, *id.*, at 23; to examine the debtor and any individuals who might have possession of the debtor's property, §§14, 18, 19, *id.*, at 25–27; and to issue a "certificate of discharge" once the estate had been distributed, §36, *id.*, at 31.

The American legislation differed slightly from the English, however. That difference reflects both the uniqueness of a system involving multiple sovereigns and the concerns that lay at the core of the Bankruptcy Clause itself. The English statute gave a judge sitting on a court where the debtor had obtained his discharge the power to order a sheriff, "Bailiff or Officer, Gaoler or Keeper of any Prison" to release the "Bankrupt out of Custody" if he were arrested subsequent to the discharge. 5 Geo. 2, ch. 30, ¶13 (1732). The American version of this provision was worded differently; it specifically granted federal courts

the authority to issue writs of habeas corpus effective to release debtors from state prisons. See §38, 2 Stat. 32; see also *In re Comstock*, 6 F. Cas. 237, 239 (No. 3,073) (Vt. 1842) (observing that Bankruptcy Act of 1800, then repealed, would have granted a federal court the power to issue a writ of habeas corpus to release a debtor from state prison if he had been arrested following his bankruptcy discharge).

This grant of habeas power is remarkable not least because it would be another 67 years, after ratification of the Fourteenth Amendment, before the writ would be made generally available to state prisoners. See *Ex parte Royall*, 117 U. S. 241, 247 (1886).[11] Moreover, the provision of the 1800 Act granting that power was considered and adopted during a period when state sovereign immunity could hardly have been more prominent among the Nation's concerns. *Chisholm* v. *Georgia*, 2 Dall. 419, the case that had so "shock[ed]" the country in its lack of regard for state sovereign immunity, *Principality of Monaco* v. *Mississippi*, 292 U. S. 313, 325 (1934), was decided in 1793. The ensuing five years that culminated in adoption of the Eleventh Amendment were rife with discussion of States' sovereignty and their amenability to

---

[11] The Judiciary Act of 1789 authorized issuance of the writ, but only to release those held in *federal* custody. See Haines, The Uniformity Power: Why Bankruptcy is Different, 77 Am. Bankr. L. J. 129, 179–181 (2003) (hereinafter Haines). Also, in the interim between 1800 and 1867, Congress authorized limited issuance of the writ in response to two crises it viewed as sufficiently pressing to warrant a federal response: The South Carolina nullification controversy of 1828–1833 and the imprisonment of a foreign national by New York State a few years later. See 4 Stat. 632 (1833); 5 Stat. 539 (1842); see also W. Duker, A Constitutional History of Habeas Corpus 187–189 (1980). The 1833 statute made the writ available to U. S. citizens imprisoned by States for actions authorized by federal law, while the 1842 statute gave federal judges the power to release foreign nationals imprisoned for actions authorized by foreign governments.

suit. Yet there appears to be no record of any objection to the bankruptcy legislation or its grant of habeas power to federal courts based on an infringement of sovereign immunity. See Haines 184–185.

This history strongly supports the view that the Bankruptcy Clause of Article I, the source of Congress' authority to effect this intrusion upon state sovereignty, simply did not contravene the norms this Court has understood the Eleventh Amendment to exemplify. Cf. *Blatchford* v. *Native Village of Noatak*, 501 U. S. 775, 779 (1991) ("[W]e have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms . . ."). [12] Petitioners, ignoring this history, contend that nothing in the *words* of the Bankruptcy Clause evinces an intent on the part of the Framers to alter the "background principle" of state sovereign immunity. *Seminole Tribe of Fla.*, 517 U. S., at 72. Specifically, they deny that the word "uni-

---

[12] Further evidence of the Framers' intent to exempt laws "on the subject of Bankruptcies" from the operation of state sovereign immunity principles can be gleaned from §62 of the Bankruptcy Act of 1800. That section provided that "nothing contained in this law shall, in any manner, affect the right of preference to prior satisfaction of debts due to the United States as secured or provided by any law heretofore passed, nor shall be construed to lessen or impair any right to, or security for, money due to the United States or to any of them." 2 Stat. 36. That Congress felt the need to carve out an exception for States' preferences undermines any suggestion that it was operating against a background presumption of state sovereign immunity to bankruptcy laws. Indeed, one contemporary commentator read this section of the Act as requiring that the protected "priorit[ies]" would have to be "specifically given by some act of the Legislature of the Union" before they would be exempt from operation of the Act's provisions. See T. Cooper, The Bankrupt Law of America, Compared with the Bankrupt Law of England 334 (1801) (reprint 1992) ("But I do not apprehend [that] this extends to give any priority to the United States, not specifically given by some act of the Legislature of the Union: nor will the English doctrine of priorities in favour of the crown be extended by analogy into this country").

form" in the Clause implies anything about pre-existing immunities or Congress' power to interfere with those immunities. See Brief for Petitioners 32–42. Whatever the merits of petitioners' argument,[13] it misses the point;

---

[13]Petitioners make much of precedents suggesting that the word "uniform" represents a limitation, rather than an expansion, of Congress' legislative power in the bankruptcy sphere. See, *e.g.*, *Gibbons*, 455 U. S., at 468 ("Unlike the Commerce Clause, the Bankruptcy Clause itself contains an affirmative limitation or restriction upon Congress' power: bankruptcy laws must be uniform throughout the United States"). They also cite Justice Frankfurter's concurring opinion in *Vanston Bondholders Protective Comm.* v. *Green*, 329 U. S. 156 (1946), for the proposition that "[t]he Constitutional requirement of uniformity is a requirement of geographic uniformity," *id.*, at 172. Based on these authorities, petitioners argue that the word "uniform" in the Bankruptcy Clause cannot be interpreted to confer upon Congress any greater authority to impinge upon state sovereign immunity than is conferred, for example, by the Commerce Clause. See Brief for Petitioners 33.

Petitioners' logic is not persuasive. Although our analysis does not rest on the peculiar text of the Bankruptcy Clause as compared to other Clauses of Article I, we observe that, if anything, the mandate to enact "uniform" laws supports the historical evidence showing that the States agreed not to assert their sovereign immunity in proceedings brought pursuant to "Laws on the subject of Bankruptcies." That Congress is constrained to enact laws that are uniform in application, whether geographically or otherwise, cf. *Gibbons*, 455 U. S., at 470 (invalidating a bankruptcy law aimed at "one regional bankrupt railroad" and no one else), does not imply that it *lacks power* to enact bankruptcy legislation that is uniform in a more robust sense. See Haines 158–172. As our holding today demonstrates, Congress has the power to enact bankruptcy laws the purpose and effect of which are to ensure uniformity in treatment of state and private creditors. See *Sturges* v. *Crowninshield*, 4 Wheat. 122, 193–194 (1819) (Marshall, C. J.) ("The peculiar terms of the grant certainly deserve notice. Congress is not authorized merely to pass laws, the operation of which shall be uniform, but to *establish* uniform laws on the subject throughout the United States"); see also *In re Dehon, Inc.*, 327 B. R. 38, 57–58 (Bkrtcy. Ct. Mass. 2005) (discussing *Lathrop* v. *Drake*, 91 U. S. 516 (1876)); The Federalist Nos. 32 and 81, pp. 197–201, 481–491 (C. Rossiter ed. 1961) (A. Hamilton) (pointing to the "uniform[ity]" language of the Naturalization Clause, which appears in the same clause of Article I as the bankruptcy provision, as

text aside, the Framers, in adopting the Bankruptcy Clause, plainly intended to give Congress the power to redress the rampant injustice resulting from States' refusal to respect one another's discharge orders. As demonstrated by the First Congress' immediate consideration and the Sixth Congress' enactment of a provision granting federal courts the authority to release debtors from state prisons, the power to enact bankruptcy legislation was understood to carry with it the power to subordinate state sovereignty, albeit within a limited sphere.

The ineluctable conclusion, then, is that States agreed in the plan of the Convention not to assert any sovereign immunity defense they might have had in proceedings brought pursuant to "Laws on the subject of Bankruptcies." See *Blatchford*, 501 U. S., at 779 (observing that a State is not "subject to suit in federal court unless it has consented to suit, either expressly or in the 'plan of the convention'"); *Alden* v. *Maine*, 527 U. S., at 713 (same).[14] The scope of this consent was limited; the jurisdiction exercised in bankruptcy proceedings was chiefly *in rem*—a narrow jurisdiction that does not implicate state sovereignty to nearly the same degree as other kinds of jurisdic-

---

an example of an instance where the Framers contemplated a "surrender of [States'] immunity in the plan of the convention").

[14]One might object that the writ of habeas corpus was no infringement on state sovereignty, and would not have been understood as such, because that writ, being in the nature of an injunction against a state official, does not commence or constitute a suit against the State. See *Ex parte Young*, 209 U. S. 123, 159–160 (1908). While that objection would be supported by precedent today, it would not have been apparent to the Framers. The *Ex parte Young* doctrine was not finally settled until over a century after the Framing and the enactment of the first bankruptcy statute. Indeed, we have recently characterized the doctrine as an expedient "fiction" necessary to ensure the supremacy of federal law. See *Pennhurst State School and Hospital* v. *Halderman*, 465 U. S. 89, 114, n. 25 (1984); see also *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U. S. 261, 281 (1997).

tion. But while the principal focus of the bankruptcy proceedings is and was always the res, some exercises of bankruptcy courts' powers—issuance of writs of habeas corpus included—unquestionably involved more than mere adjudication of rights in a res. In ratifying the Bankruptcy Clause, the States acquiesced in a subordination of whatever sovereign immunity they might otherwise have asserted in proceedings necessary to effectuate the *in rem* jurisdiction of the bankruptcy courts.[15]

V

Neither our decision in *Hood*, which held that States could not assert sovereign immunity as a defense in adversary proceedings brought to adjudicate the dischargeability of student loans, nor the cases upon which it relied, see 541 U. S., at 448–449 (discussing *New York* v. *Irving Trust Co.*, 288 U. S. 329 (1933); *Gardner*, 329 U. S. 565; and *Van Huffel* v. *Harkelrode*, 284 U. S. 225 (1931)), rested on any statement Congress had made on the subject of state sovereign immunity. Nor does our decision today. The relevant question is not whether Congress has "abrogated" States' immunity in proceedings to recover preferential transfers. See 11 U. S. C. §106(a).[16] The question, rather, is whether Congress' determination that States should be amenable to such proceedings is within the scope of its power to enact "Laws on the subject of Bankruptcies." We think it beyond peradventure that it is.

Congress may, at its option, either treat States in the same way as other creditors insofar as concerns "Laws on

---

[15] We do not mean to suggest that every law labeled a "bankruptcy" law could, consistent with the Bankruptcy Clause, properly impinge upon state sovereign immunity.

[16] Cf. *Hoffman*, 492 U. S., at 101 (holding that, in an earlier version of 11 U. S. C. §106, Congress had failed to make sufficiently clear its intent to abrogate state sovereign immunity).

the subject of Bankruptcies" or exempt them from operation of such laws. Its power to do so arises from the Bankruptcy Clause itself; the relevant "abrogation" is the one effected in the plan of the Convention, not by statute.

The judgment of the Court of Appeals for the Sixth Circuit is affirmed.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 04–885

CENTRAL VIRGINIA COMMUNITY COLLEGE, ET AL., PETITIONERS *v.* BERNARD KATZ, LIQUIDATING SUPERVISOR FOR WALLACE'S BOOKSTORES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[January 23, 2006]

JUSTICE THOMAS, with whom THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE KENNEDY join, dissenting.

Under our Constitution, the States are not subject to suit by private parties for monetary relief absent their consent or a valid congressional abrogation, and it is "settled doctrine" that nothing in Article I of the Constitution establishes those preconditions. *Alden* v. *Maine*, 527 U. S. 706, 748 (1999). Yet the majority today casts aside these long-established principles to hold that the States are subject to suit by a rather unlikely class of individuals—bankruptcy trustees seeking recovery of preferential transfers for a bankrupt debtor's estate. This conclusion cannot be justified by the text, structure, or history of our Constitution. In addition, today's ruling is not only impossible to square with this Court's settled state sovereign immunity jurisprudence; it is also impossible to reach without overruling this Court's judgment in *Hoffman* v. *Connecticut Dept. of Income Maintenance*, 492 U. S. 96 (1989).

The majority maintains that the States' consent to suit can be ascertained from the history of the Bankruptcy Clause. But history confirms that the adoption of the Constitution merely established federal power to legislate in the area of bankruptcy law, and did not manifest an

additional intention to waive the States' sovereign immunity against suit. Accordingly, I respectfully dissent.

I

The majority does not appear to question the established framework for examining the question of state sovereign immunity under our Constitution. The Framers understood, and this Court reiterated over a century ago in *Hans* v. *Louisiana*, 134 U. S. 1 (1890), that

> "'It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the Union. *Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states* . . . .'"

Id., at 13 (quoting The Federalist No. 81, pp. 548-549 (J. Cooke ed. 1961)) (emphasis added and deleted) (hereinafter The Federalist No. 81). See also *Ex parte New York*, 256 U. S. 490, 497 (1921) ("That a State may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given"); *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 54 (1996).

These principles were further reinforced early in our Nation's history, when the people swiftly rejected this Court's decision in *Chisholm* v. *Georgia*, 2 Dall. 419 (1793), by ratifying the Eleventh Amendment less than two years later. See *Hans*, *supra*, at 11; *Reid* v. *Covert*,

354 U. S. 1, 14, n. 27 (1957). Thus, "[f]or over a century [since *Hans*] we have reaffirmed that federal jurisdiction over suits against unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States.'" *Seminole Tribe*, *supra*, at 54 (quoting *Hans*, *supra*, at 15); see also *Seminole Tribe*, *supra*, at 54–55, n. 7 (collecting cases).

The majority finds a surrender of the States' immunity from suit in Article I of the Constitution, which authorizes Congress "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." §8, cl. 4. But nothing in the text of the Bankruptcy Clause suggests an abrogation or limitation of the States' sovereign immunity. Indeed, as this Court has noted on numerous occasions, "[t]he Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." *Seminole Tribe*, *supra*, at 72–73. "[I]t is settled doctrine that neither substantive federal law nor attempted congressional abrogation under Article I bars a State from raising a constitutional defense of sovereign immunity in federal court." *Alden*, *supra*, at 748. See also *Kimel* v. *Florida Bd. of Regents*, 528 U. S. 62, 80 (2000); *Board of Trustees of Univ. of Ala.* v. *Garrett*, 531 U. S. 356, 364 (2001). And we have specifically applied this "settled doctrine" to bar abrogation of state sovereign immunity under various clauses within §8 of Article I. See, *e.g.*, *Seminole Tribe*, *supra*, at 44 (the Interstate and Indian Commerce Clauses); *Florida Prepaid Postsecondary Ed. Expense Bd.* v. *College Savings Bank*, 527 U. S. 627 (1999) (the Patents Clause).

It is difficult to discern an intention to abrogate state sovereign immunity through the Bankruptcy Clause when no such intention has been found in any of the other clauses in Article I. Indeed, our cases are replete with acknowledgments that there is nothing special about the

Bankruptcy Clause in this regard. See *Seminole Tribe*, 517 U. S., at 72–73, n. 16; see also *id.*, at 93–94 (STEVENS, J., dissenting) ("In confronting the question whether a federal grant of jurisdiction is within the scope of Article III, as limited by the Eleventh Amendment, I see no reason to distinguish among statutes enacted pursuant to the power granted to Congress to regulate commerce among the several States, and with the Indian tribes, the power to establish uniform laws on the subject of bankruptcy, [or] the power to promote the progress of science and the arts by granting exclusive rights to authors and inventors" (citations omitted)); *id.*, at 77–78, and n. 1 (STEVENS, J., dissenting); *Hoffman*, 492 U. S., at 105 (SCALIA, J., concurring in judgment). Today's decision thus cannot be reconciled with our established sovereign immunity jurisprudence, which the majority does not purport to overturn.

The majority's departure from this Court's precedents is not limited to this general framework, however; the majority also overrules *sub silentio* this Court's holding in *Hoffman*, *supra*. The petitioner in *Hoffman*, *id.*, at 99—like respondent Katz here—sought to pursue a preference avoidance action against a state agency pursuant to 11 U. S. C. §547(b). The plurality opinion, joined by four Members of this Court, held that Eleventh Amendment immunity barred suit because Congress had failed to enact legislation sufficient to abrogate that immunity, and expressed no view on whether Congress possessed the constitutional power to do so. *Hoffman*, *supra*, at 104. JUSTICE SCALIA concurred in the judgment, arguing that there was no need to examine the statute because the Bankruptcy Clause does not empower Congress to enact legislation abrogating state sovereign immunity. See *id.*, at 105; see also *ibid.* (O'CONNOR, J., concurring) ("I agree with JUSTICE SCALIA that Congress may not abrogate the States' Eleventh Amendment immunity by enacting a statute under the Bankruptcy Clause"). Thus, a majority

of the Court in *Hoffman* agreed: (1) that a preference action in bankruptcy against a state agency is barred by sovereign immunity; and (2) that, at a minimum (and absent the State's consent), overcoming that immunity would require a clearer statutory abrogation than Congress had provided.[1]

After today's decision, however, *Hoffman* can no longer stand. For today's decision makes clear that *no action* of Congress is needed because the Bankruptcy Clause itself manifests the consent of the States to be sued. *Ante,* at 21.

II

The majority supports its break from precedent by relying on historical evidence that purportedly reveals the Framers' intent to eliminate state sovereign immunity in bankruptcy proceedings. *Ante,* at 4, 15. The Framers undoubtedly wanted to give Congress the authority to enact a national law of bankruptcy, as the text of the Bankruptcy Clause confirms. But the majority goes further, contending that the Framers found it intolerable that bankruptcy laws could vary from State to State, and demanded the enactment of a single, uniform national body of bankruptcy law. *Ante,* at 7–10. The majority then concludes that, to achieve a uniform national bankruptcy law, the Framers must have intended to waive the States' sovereign immunity against suit. *Ante,* at 4. Both claims are unwarranted.

A

In contending that the States waived their immunity from suit by adopting the Bankruptcy Clause, the majority conflates two distinct attributes of sovereignty: the authority of a sovereign to enact legislation regulating its own

---

[1]The parties in *Hoffman* likewise agreed that the suit was barred by Eleventh Amendment immunity absent some further action by Congress. 492 U. S., at 101.

citizens, and sovereign immunity against suit by private citizens.[2] Nothing in the history of the Bankruptcy Clause suggests that, by including that clause in Article I, the founding generation intended to waive the latter aspect of sovereignty. These two attributes of sovereignty often do not run together—and for purposes of enacting a uniform law of bankruptcy, they need not run together.

For example, Article I also empowers Congress to regulate interstate commerce and to protect copyrights and patents. These provisions, no less than the Bankruptcy Clause, were motivated by the Framers' desire for nationally uniform legislation. See James Madison, Preface to Debates in the Convention of 1787, reprinted in 3 M. Farrand, Records of the Federal Convention of 1787, pp. 539, 547–548 (1911) (hereinafter Farrand's Debates) (noting lack of national regulation of commerce and uniform bankruptcy law as defects under the Articles of Confederation); M. Farrand, The Framing of the Constitution of the United States 48 (1913) (noting that the Articles of Confederation failed to provide for uniform national regulation of naturalization, bankruptcy, copyrights, and patents). Thus, we have recognized that "[t]he need for uniformity in the construction of patent law is undoubtedly important." *Florida Prepaid*, 527 U. S., at 645. Nonetheless, we have refused, in addressing patent law, to give the need for uniformity the weight the majority today assigns it in the context of bankruptcy, instead recognizing that this need "is a factor which belongs to the Article I patent-power calculus, rather than to any determination of whether a state plea of sovereign immunity deprives a

---

[2] Immunity against suit is just "one of the attributes of sovereignty, . . . enjoyed by the government of every state in the Union." The Federalist No. 81, at 549. The sovereign power to legislate is a distinct attribute of sovereignty; it is discussed, for example, in a completely separate portion of the Federalist than immunity from suit. See, *e.g.*, *id.*, No. 32.

patentee of property without due process of law." *Ibid.*

Nor is the abrogation of state sovereign immunity from suit necessary to the enactment of nationally uniform bankruptcy laws. The sovereign immunity of the States against suit does not undermine the objective of a uniform national law of bankruptcy, any more than does any differential treatment between different categories of creditors. Cf. *Railway Labor Executives' Assn.* v. *Gibbons*, 455 U. S. 457, 469 (1982) ("The uniformity requirement is not a straightjacket that forbids Congress to distinguish among classes of debtors, nor does it prohibit Congress from recognizing that state laws do not treat commercial transactions in a uniform manner").

B

The majority also greatly exaggerates the depth of the Framers' fervor to enact a national bankruptcy regime. The idea of authorizing Congress to enact a nationally uniform bankruptcy law did not arise until late in the Constitutional Convention, which began in earnest on May 25, 1787. 1 Farrand's Debates xi. The Convention charged the Committee of Detail with putting forth a comprehensive draft Constitution, which it did on August 6. *Ibid.*; 2 *id.*, at 177. Yet the Convention did not consider the language that eventually became the Bankruptcy Clause until September 1, *id.*, at 483–485, and it adopted the provision with little debate two days later, *id.*, at 489. Under the majority's analysis, which emphasizes the Framers' zeal to enact a national law of bankruptcy, this timing is difficult to explain.

The majority's premise fares even worse in explaining the postratification period. The majority correctly notes that the practice of the early Congresses can provide valuable insight into the Framers' understanding of the Constitution. *Ante*, at 15. But early practice undermines, rather than supports, the majority's theory. "For over a

century after the Constitution, . . . the Bankruptcy Clause [authority] remained largely unexercised by Congress. . . . Thus, states were free to act in bankruptcy matters for all but 16 of the first 109 years after the Constitution was ratified." Tabb, The History of the Bankruptcy Laws in the United States, 3 Am. Bankr. Inst. L. Rev. 5, 13–14 (1995). And when Congress did act, it did so only in response to a major financial disaster, and it repealed the legislation in each instance shortly thereafter. *Id.*, at 14-21.[3] It was not until 1898, well over a century after the adoption of the Bankruptcy Clause, that Congress adopted the first permanent national bankruptcy law. 30 Stat. 544.

The historical record thus refutes, rather than supports, the majority's premise that the Framers placed paramount importance on the enactment of a nationally uniform bankruptcy law. In reality, for most of the first century of our Nation's history, the country survived without such a

---

[3]For over a dozen years after the ratification of the Constitution, Congress failed to adopt a single bankruptcy law. See, *e.g.*, 9 Annals of Congress 2671 (1799) (noting that Congress had "not . . . passed [bankruptcy legislation] for these ten years past, and the States [have] legislated upon it in their own way" (statement of Rep. Baldwin)); 3 Farrand's Debates 380 (same)). It was not until April 4, 1800, that the Sixth Congress finally adopted our Nation's first bankruptcy law, ch. 19, 2 Stat. 19, and even that law left an ample role for state law, *id.*, §61, at 36. (By contrast, the very first Congress enacted, *inter alia*, patent and copyright legislation. 1 Stat. 109, 124.)

Moreover, that first Act was short-lived; Congress repealed it just three years later. 2 Stat. 248. And over a decade later, this Court confirmed what Congress' inattention had already communicated—that the Bankruptcy Clause does not vest exclusive power in Congress, but instead leaves an ample role for the States. See *Sturges* v. *Crowninshield*, 4 Wheat. 122 (1819). It was not until 1841 that Congress would enact another bankruptcy law, ch. 9, 5 Stat. 440, only to repeal it less than two years later, ch. 82, 5 *id.*, at 614. The economic upheaval of the Civil War caused Congress to pass another bankruptcy law in 1867, ch. 176, 14 Stat. 517, but that too was repealed after just over a decade, ch. 160, 20 Stat. 99.

law, relying instead on the laws of the several States.

Moreover, the majority identifies *no* historical evidence suggesting that the Framers or the early legislatures, even if they were anxious to establish a national bankruptcy law, contemplated that the States would subject themselves to private suit as creditors under that law. In fact, the historical record establishes that the Framers' held the opposite view. To the Framers, it was a particularly grave offense to a State's sovereignty to be hauled into court by a private citizen and forced to make payments on debts. Alexander Hamilton, the author of Federalist No. 81, followed his general discussion of state sovereign immunity by emphasizing that the Constitution would be especially solicitous of state sovereignty within the specific context of payment of state debts:

> "'[T]here is no color to pretend that the state governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretension to a compulsive force. They confer no right of action independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident that it could not be done without waging war against the contracting State; and to ascribe to the federal courts by mere implication, and in destruction of a pre-existing right of the state governments, a power which would involve such a consequence, would be altogether forced and unwarrantable.'" *Hans*, 134 U. S., at 13 (quoting The Federalist No. 81, at 549).

C

The majority attempts to bolster its historical argument by making three additional observations about the bankruptcy power: (1) Congress' early provision of habeas corpus relief in bankruptcy to forbid the imprisonment of a debtor by one State, in violation of a discharge order issued by the courts of another State, *ante*, at 6–7, 16–17; (2) the inability of debtors, first in the American Colonies and then under the Articles of Confederation, to enforce in one state court a discharge order issued by another state court, *ante*, at 7–11; and (3) the historical understanding that bankruptcy jurisdiction is principally *in rem*, *ante*, at 11–15. The implication is that, if these specific observations about bankruptcy are correct, then States must necessarily be subject to suit in transfer recovery proceedings, if not also in other bankruptcy settings. *Ante*, at 12; *ante*, at 19–20. But none of these observations comes close to demonstrating that, under the Bankruptcy Clause, the States may be sued by private parties for monetary relief.[4]

1

The availability of habeas relief in bankruptcy between 1800 and 1803 does not support respondent's effort to obtain monetary relief in bankruptcy against state agencies today.[5] The habeas writ was well established by the

---

[4]To be sure, the majority opinion adds, in a footnote, that "[w]e do not mean to suggest that every law labeled a 'bankruptcy' law could, consistent with the Bankruptcy Clause, properly impinge upon state sovereign immunity." *Ante*, at 20, n. 15. But the majority offers no explanation of this statement; certainly it offers no principled basis on which to draw distinctions in future cases.

[5]This is particularly so given the absence of any known application of that law (let alone any test of its validity) during that time. The provision was enacted into law on April 4, 1800, ch. 19, 2 Stat. 19, and repealed on December 19, 1803, ch. 6, 2 *id.*, at 248. The sole reference cited by the majority is *In re Comstock*, 6 F. Cas. 237 (No. 3,073) (Vt. 1842), see *ante*, at 16–17, but that ruling, issued nearly 40 years after

time of the Framing, and consistent with then-prevailing notions of sovereignty. In *Ex parte Young*, 209 U. S. 123 (1908), this Court held that a petition for the writ is a suit against a state official, not a suit against a State, and thus does not offend the Eleventh Amendment:

> "The right to so discharge has not been doubted by this court, and it has never been supposed there was any suit against the state by reason of serving the writ upon one of the officers of the state in whose custody the person was found. In some of the cases the writ has been refused as matter of discretion; but in others it has been granted, while the power has been fully recognized in all." *Id.*, at 168 (collecting cases).

This Court has reaffirmed *Young* repeatedly—including in *Seminole Tribe*, 517 U. S., at 71, n. 14. Although the majority observes that *Young* was not issued "until over a century after the Framing and the enactment of the first bankruptcy statute," *ante*, at 20, n. 14, this observation does nothing to reconcile the majority's analysis with *Young*, as the majority does not purport to question the historical underpinnings of *Young*'s holding. The availability of federal habeas relief to debtors in state prisons thus has no bearing whatsoever on whether the Bankruptcy Clause authorizes suits against the States for money damages.[6]

---

the 1800 Act's repeal, merely noted in dicta the prior existence of the habeas provision.

[6]The majority also contends that the provision for habeas relief in the 1800 bankruptcy law is "remarkable not least because it would be another 67 years, after ratification of the Fourteenth Amendment, before the writ would be made generally available to state prisoners." *Ante*, at 17. The implication is that the Bankruptcy Clause shares a similar pedigree with the Fourteenth Amendment, which (unlike Article I of the Constitution) authorizes Congress to abrogate state sovereign immunity against suit. See, *e.g.*, *Fitzpatrick* v. *Bitzer*, 427

2

The majority's second observation—that the Framers were concerned that, under the Articles of Confederation, debtors were unable to obtain discharge orders issued by the court of one State that would be binding in the court of another State, *ante*, at 7–11—implicates nothing more than the application of full faith and credit, as is apparent from the majority opinion itself. Accordingly, it has nothing to do with state sovereign immunity from suit.

To support its observation, the majority describes at length two Pennsylvania court rulings issued under the Articles of Confederation. See *James* v. *Allen*, 1 Dall. 188 (C. P. Phila. Cty. 1786); *Millar* v. *Hall*, 1 Dall. 229 (Pa. 1788). But as the majority's explanation makes clear, the problem demonstrated by these cases is the need for recognition of sister-state judgments by state courts, not disregard for state sovereign immunity against suit in federal courts. Both *James* and *Millar* involved litigation between a private debtor and a private creditor. In both cases, the creditor filed suit in a Pennsylvania court to enforce a debt. And in both cases, the debtor sought but failed to obtain recognition of a judgment of discharge that had previously been entered by a court of another State. *Ante*, at 10.

Accordingly, it is unsurprising that, when the issue of bankruptcy arose at the Constitutional Convention, it was

---

U. S. 445 (1976). But as the majority recognizes, *ante*, at 17, n. 11, Congress *did* enact other habeas provisions prior to the Fourteenth Amendment. See 4 Stat. 632; 5 Stat. 539; see generally W. Duker, A Constitutional History of Habeas Corpus 187–189 (1980) (discussing the 1833 and 1842 Acts). The Fourteenth Amendment bears no relevance to this discussion in any event, because as I have explained above, habeas relief simply does not offend the Framers' view of state sovereign immunity. See also *Young*, 209 U. S., at 150 ("[A] decision of this case does not require an examination or decision of the question whether [the] adoption [of the Fourteenth Amendment] in any way altered or limited the effect of the [Eleventh] Amendment").

also within the context of full faith and credit. See *ante*, at 10–11.[7] As the majority correctly points out, the Framers "plainly intended to give Congress the power to redress the rampant injustice resulting from States' refusal to respect one another's discharge orders." *Ante*, at 19. But redress of that "rampant injustice" turned entirely on binding state courts to respect the discharge orders of their sister States under the Full Faith and Credit Clause, not on the authorization of private suits against the States.

3

Finally, the majority observes that the bankruptcy power is principally exercised through *in rem* jurisdiction. *Ante*, at 11–15. The fact that certain aspects of the bankruptcy power may be characterized as *in rem*, however, does not determine whether or not the States enjoy sovereign immunity against such *in rem* suits. And it certainly does not answer the question presented in this case: whether the Bankruptcy Clause subjects the States to transfer recovery proceedings—proceedings the majority describes as "ancillary to and in furtherance of the court's *in rem* jurisdiction," though not necessarily themselves *in rem*, *ante*, at 14.

Two years ago, this Court held that a State is bound by a bankruptcy court's discharge order, notwithstanding the

---

[7]The same point was made in *Railway Labor Executives' Assn.* v. *Gibbons*, 455 U. S. 457 (1982): "Prior to the drafting of the Constitution, at least four States followed the practice of passing private Acts to relieve individual debtors. Given the sovereign status of the States, questions were raised as to whether one State had to recognize the relief given to a debtor by another State [citing *James* and *Millar*]. Uniformity among state debtor insolvency laws was an impossibility and the practice of passing private bankruptcy laws was subject to abuse if the legislators were less than honest. Thus, it is not surprising that the Bankruptcy Clause was introduced during discussion of the Full Faith and Credit Clause." *Id.*, at 472 (citations omitted).

State's invocation of sovereign immunity, because such actions arise out of *in rem* jurisdiction. See *Tennessee Student Assistance Corporation* v. *Hood*, 541 U. S. 440, 448 (2004). In doing so, however, the Court explicitly distinguished recovery of preferential transfers, noting that the debt discharge proceedings there were "unlike an adversary proceeding by the bankruptcy trustee seeking to recover property in the hands of the State on the grounds that the transfer was a voidable preference." *Id.*, at 454.

The fact that transfer recovery proceedings fall outside any possible *in rem* exception to sovereign immunity is confirmed by *United States* v. *Nordic Village, Inc.*, 503 U. S. 30 (1992), which involved similar facts. There, the Bankruptcy Trustee filed a transfer avoidance action against the United States, in order to recover a recent payment the debtor had made to the Internal Revenue Service on a tax debt. See *id.*, at 31. After determining that the United States had not waived its sovereign immunity, the Court rejected the trustee's alternative argument based on *in rem* jurisdiction. As the Court explained, "[r]espondent sought to recover a sum of money, not 'particular dollars,' so there was no *res* to which the court's *in rem* jurisdiction could have attached." *Id.*, at 38 (quoting *Begier* v. *IRS*, 496 U. S. 53, 62 (1990) (internal citations omitted and emphasis deleted)).[8]

---

[8] *Begier* involved funds held by the debtor in statutory trust for the United States—so its analysis of those "particular dollars" does not help the respondent in this case. 496 U. S., at 62 (emphasis deleted). Nor does *United States* v. *Whiting Pools, Inc.*, 462 U. S. 198 (1983), support the majority's effort. In *Whiting Pools*, the United States waived its immunity by filing suit. See *id.*, at 200–01; see also *Nordic Village*, 503 U. S., at 39 ("The Court's opinion in *Whiting Pools* contains no discussion of §106(c) [the waiver provision]"). Furthermore, in *Whiting Pools* the Government possessed merely a secured interest in the property on the basis of a tax lien, see 462 U. S., at 202. By contrast, here, as in *Nordic Village*, it is uncontested that the State owns the funds, barring any subsequent transfer by operation of bankruptcy

The majority attempts to evade *Nordic Village* by claiming that "the trustee in this case, unlike the one in *Nordic Village*, seeks, in the alternative, both return of the 'value' of the preference, and return of the actual 'property transferred.'" *Ante*, at 14, n. 10 (quoting 11 U. S. C. §550(a)). But where, as here, the property in question is money, there is no practical distinction between these two options, and surely we did not reach the result in *Nordic Village* because of an accident of pleading. Moreover, it is hardly clear that the trustee in *Nordic Village* failed to ask for a "return" of the "'property transferred,'" *ante*, at 14, n. 10, and the majority does not cite anything to support its assertion. See also *Nordic Village*, *supra*, at 31 ("[T]he trustee . . . commenced an adversary proceeding . . . seeking to recover, among other transfers, the $20,000 paid . . . to the IRS"); *In re Nordic Village, Inc.*, 915 F. 2d 1049, 1051 (CA6 1990) ("The trustee subsequently initiated a proceeding to recover several unauthorized post-petition transfers, including the transfer to the IRS").

In light of the weakness of its historical evidence that the States consented to be sued in bankruptcy proceedings, the majority's effort to recast respondent's action as *in rem* is understandable, but unconvincing.

* * *

It would be one thing if the majority simply wanted to overrule *Seminole Tribe* altogether. That would be wrong, but at least the terms of our disagreement would be transparent. The majority's action today, by contrast, is difficult to comprehend. Nothing in the text, structure, or history of the Constitution indicates that the Bankruptcy Clause, in contrast to all of the other provisions of Article

---

law. See 503 U. S., at 39 ("A suit for payment of funds from the Treasury is quite different from a suit for the return of tangible property in which the debtor retained ownership").

I, manifests the States' consent to be sued by private citizens.

I respectfully dissent.